

Nothing to Fear but FIRREA Itself: Revising and Reshaping the Enforcement Process of Federal Bank Regulation*

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I. INTRODUCTION

The depository institutions¹ industry has been subjected to a considerable crisis with respect to the continuing viability of the "savings associations"² sector of the industry.³ Federal concern over this crisis recently resulted in the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).⁴ Its very name identifies the essential elements that stand in balance in the federal response to the crisis, and these elements are articulated in the explicit statutory purposes of FIRREA. At the center of this response is an effort to effect the recovery of the savings associations sector, by "establish[ing] a new corporation, to be known

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1. In this context, the term "depository institution" is used to refer to commercial banks, savings banks and savings and loan associations (now known collectively as "savings associations"), and credit unions. The general meaning of the term is discussed in 1 M. MALLOY, *THE CORPORATE LAW OF BANKS* 5-8 (1988) (refer also to 1989 Cum. Supp. No. 2). See 12 U.S.C. § 461(b)(1)(A) (1988) (Federal Reserve Act; statutory definition of "depository institution"), Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, § 204(c)(1), 103 Stat. 183, 191 (1989) (codified at 12 U.S.C. § 1813(c)(1)) [hereinafter FIRREA] (Federal Deposit Insurance Act; definition of "depository institution"). All subsequent citations to the United States Code following a reference to FIRREA are referring to the section as amended by the 1989 Act. Other Code citations refer to the section as it existed prior to 1989. See also *infra* notes 143-45 and accompanying text (recent statutory amendments concerning use of the term "depository institution").

2. The term "savings association" is now a statutory term of art, defined as follows:

The term "savings association" means — (A) any Federal savings association; (B) any State savings association; and (C) any corporation (other than a bank) that the Board of Directors [of the Federal Deposit Insurance Corporation] and the Director of the Office of Thrift Supervision jointly determine to be operating in substantially the same manner as a savings association.

FIRREA, *supra* note 1, § 204(b)(1) (codified at 12 U.S.C. § 1813(b)(1)). For a discussion on the Director of the Office of Thrift Supervision, see *infra* text accompanying notes 158-80. A "Federal savings association" is defined by FIRREA to mean "any Federal savings association or Federal savings bank which is chartered under section 5 of the Home Owners' Loan Act [codified at 12 U.S.C. § 1464]." FIRREA, *supra* note 1, § 204(b)(2) (codified at 12 U.S.C. § 1813(b)(2)). A "State savings association" is defined to mean

(A) any building and loan association, savings and loan association, or homestead association; or

(B) any cooperative bank (other than a cooperative bank which is a State bank as defined in [FIRREA, *supra* note 1, § 204(a)(2) (codified at 12 U.S.C. § 1813(a)(2))]),

which is organized and operating according to the laws of the State . . . in which it is chartered or organized.

FIRREA, *supra* note 1, § 204(b)(3) (codified at 12 U.S.C. § 1813(b)(3)). While this generic term of art "savings association" is new to federal law, it has seen previous acceptance in state statutory provisions on the regulation of depository institutions. See, e.g., CAL. FIN. CODE §§ 5000-10050 (savings association law). See also 1 M. MALLOY, *supra* note 1, at 178:

The statutory trend, manifested in the California and Florida statutes, toward a unitary system regulating the formation of any and all thrift institutions (generically referred to as *associations* or *savings associations*) seems a particularly sensible one. In fact, the thrift institution industry is to a great extent unitary, and a reflection of this unity in the regulatory system governing entry into the industry is quite appropriate.

(Emphasis in original)

3. See, e.g., *infra* note 120 and accompanying text (discussing the thrift industry crisis).

4. See *supra* note 1. See *infra* notes 119-285 and accompanying text (overview of FIRREA).

as the Resolution Trust Corporation,[⁵] to contain, manage and resolve failed savings associations”⁶ and by “provid[ing] funds from public and private sources to deal expeditiously with failed depository institutions.”⁷ In addition, the act is intended “[t]o put the Federal deposit insurance funds on a sound financial footing.”⁸

However, FIRREA is not simply a “bailout” of failing depository institutions. It is evident from the structure of the act that “recovery” is counterbalanced by a prospective concern with reform of the system of federal regulation of depository institutions, and particularly of savings institutions, “[t]o promote, through regulatory reform, a safe and stable system of affordable housing finance.”⁹ Specific goals of regulatory reform in this regard are articulated by FIRREA, in the following terms. FIRREA is intended, among other things,

[t]o improve the supervision of savings associations by strengthening capital, accounting, and other supervisory standards[;]^[10]

. . . [t]o curtail investments and other activities of savings associations that pose unacceptable risks to the Federal deposit insurance funds[;]^[11]

. . . [t]o promote the independence of the Federal Deposit Insurance Corporation (FDIC) from the institutions the deposits of which it insures, by providing an independent board of directors, adequate funding, and appropriate powers[;]^[12] [and]

. . . [t]o establish an Office of Thrift Supervision in the Department of the Treasury, under the general oversight of the Secretary of the Treasury.¹³

A final theme in the federal response to the thrift crisis concerns enforcement, a necessary aspect of any program aimed at the prospective reform of the depository institutions industry and the system of regulation applicable to it. Here the express statutory purposes are “[t]o strengthen the enforcement powers of Federal regulators of depository institutions”¹⁴ and “[t]o strengthen the civil sanctions and criminal penalties for defrauding or otherwise damaging depository institutions and their depositors.”¹⁵

This Article will focus upon the revision and reshaping of regulatory enforcement powers and procedures. From this perspective, it should be noted that FIRREA legislatively continues a process of revision that had already begun at the adminis-

5. For a discussion of the Resolution Trust Corporation (RTC), see *infra* notes 190–92 and accompanying text.

6. FIRREA, *supra* note 1, § 101(7).

7. *Id.* § 101(8).

8. *Id.* § 101(5). On the realignment of the deposit insurance funds under FIRREA, see *infra* notes 148–52 and accompanying text.

9. FIRREA, *supra* note 1, § 101(1).

10. *Id.* § 101(2). See H.R. CONF. REP. NO. 222, 101st Cong., 1st Sess. 403–08 (1989) (discussing increased capital standards for savings associations). See also *infra* notes 232–52 and accompanying text (discussion of capital and other standards under FIRREA).

11. FIRREA, *supra* note 1, § 101(3). See H.R. CONF. REP. NO. 222, *supra* note 10, at 396–403 (discussing changes in powers of savings associations). See also *infra* notes 176–87 and accompanying text.

12. FIRREA, *supra* note 1, § 101(4). See H.R. CONF. REP. NO. 222, *supra* note 10, at 393–403 (discussing the enhanced role of the FDIC). See also *infra* notes 148–54, 176–87 and accompanying text.

13. FIRREA, *supra* note 1, § 101(6). See *infra* notes 158–80 and accompanying text (discussing the role of the Office of Thrift Supervision).

14. FIRREA, *supra* note 1, § 101(9). See H.R. CONF. REP. NO. 222, *supra* note 10 at 439–48 (discussing expanded regulatory enforcement authority). See also *infra* notes 286–338 and accompanying text.

15. FIRREA, *supra* note 1, § 101(10). See H.R. CONF. REP. NO. 222, *supra* note 10, at 445–47 (discussing enhancement of civil and criminal penalties).

trative level. There are distinct layers to this process which need to be identified before we attempt an assessment of this federal regulatory enforcement process in light of the provisions of FIRREA.

Accordingly, the analysis that follows will begin with a review of the recent, pre-FIRREA revisions of regulations governing the procedures for administrative enforcement actions.¹⁶ The Article will then offer a *tour d'horizon* of FIRREA,¹⁷ intended to give a context to the more detailed treatment of FIRREA's enhancement of the enforcement powers of the regulators.¹⁸ The Article concludes with an assessment of the likely impact of FIRREA on the enforcement process.¹⁹

II. PRE-FIRREA REVISIONS OF FORMAL ENFORCEMENT PROCEDURES

A concerted effort at revising regulations concerning enforcement practices and procedures had been under way for some time prior to congressional consideration of FIRREA.²⁰ Final revisions had already been promulgated by the FDIC in December 1988²¹ and the Federal Home Loan Bank Board (FHLBB) in June 1989.²² The Office of the Comptroller of the Currency (OCC or Comptroller) had issued a notice of proposed rulemaking with respect to its corresponding regulations in May 1989.²³

This section begins by identifying the scope of authority of the various federal regulators of depository institutions with respect to formal enforcement practices and procedures.²⁴ It then analyzes in some detail the recent efforts at administrative revision of regulations concerning these enforcement practices and procedures.²⁵

A. Scope of Formal Enforcement Authority

There are five regulators of interest in the present context: (i) the OCC, chartering authority and principal federal regulator of national banks;²⁶ (ii) the Board of Governors of the Federal Reserve System (the Fed), the U.S. central bank and principal federal regulator of state-chartered, Fed-member banks and of bank holding companies (BHCs);²⁷ (iii) the FDIC, federal insurer of deposits of national and

16. See *infra* notes 20–118 and accompanying text.

17. See *infra* notes 119–285 and accompanying text.

18. See *infra* notes 286–343 and accompanying text.

19. See *infra* notes 344–85 and accompanying text.

20. See, e.g., 50 Fed. Reg. 14,247 (1985) (FDIC Regulation Review Program); 53 Fed. Reg. 5392 (1988) (proposed FDIC revision of regulations); 53 Fed. Reg. 40,432 (1988) (proposed FHLBB revision of regulations).

21. 53 Fed. Reg. 51,656 (1988) (codified at 12 C.F.R. pt. 308) (revised FDIC Rules of Practice and Procedure promulgated in final form).

22. 54 Fed. Reg. 26,349 (1989) (codified at 12 C.F.R. pts. 509, 512) (revised FHLBB Rules of Practice and Procedure promulgated in final form).

23. 54 Fed. Reg. 22,759 (1989) (to be codified at 12 C.F.R. pt. 19) (proposed OCC revision of regulations).

24. See *infra* notes 26–76 and accompanying text.

25. See *infra* notes 77–118 and accompanying text.

26. On the role of the Comptroller and the OCC in bank regulation, see generally 1 M. MALLOY, *supra* note 1, at 28–40. National banks are commercial banks chartered by the Comptroller under the authority of the National Bank Act. See 12 U.S.C. §§ 1–216 (1988).

27. On the role of the Fed in bank regulation, see generally 1 M. MALLOY, *supra* note 1, at 40–47. Fed-member banks include all national banks in the continental United States, as required by law (see 12 U.S.C. §§ 221, 222 (1988)), and those state-chartered banks and trust companies which have chosen to apply for, and have received, membership. See *id.* § 321.

state-chartered banks and, post-FIRREA,²⁸ of deposits of savings associations,²⁹ and principal federal regulator of state-chartered, federally insured banks that are not members of the Fed;³⁰ (iv) the FHLBB and the Federal Savings and Loan Insurance Corporation (FSLIC), the pre-FIRREA³¹ primary federal regulator and insurer of federally and state-chartered, FSLIC-insured savings associations and primary federal regulator of savings and loan holding companies (SLHCs), now replaced by the Director of the Office of Thrift Supervision (DOTS) and the FDIC;³² and (v) the National Credit Union Administration (NCUA),³³ chartering authority and regulator of federal credit unions and principal federal regulator of state-chartered, federally insured credit unions. The principal formal enforcement authorities that have been exercised by these regulators are as follows.³⁴

1. Cease and Desist Orders

The cease and desist order is the administrative equivalent of an injunction. With respect to orders to be issued against national banks and officials thereof, the Federal Deposit Insurance Act (FDIA)³⁵ granted this power to the Comptroller.³⁶ With respect to state-chartered, Fed-member banks and with respect to BHCs, and the officials of either, the FDIA granted the power to the Fed.³⁷ Finally, the FDIA granted this power to the FDIC, with respect to state-chartered, nonmember insured banks and officials thereof.³⁸

The FHLBB and the FSLIC exercised parallel statutory authority, pre-FIRREA, as to federally chartered thrift associations and as to state-chartered insured thrift

28. See *infra* notes 148–50 and accompanying text (FDIC authority under FIRREA to insure deposits of banks and savings associations).

29. On the meaning of the term “savings association,” see *supra* note 2.

30. On the role of the FDIC in bank regulation, see generally 1 M. MALLOY, *supra* note 1, at 47–52. On the expanded role of the FDIC as a federal bank regulator, post-FIRREA, see *infra* notes 148–54, 176–87 and accompanying text.

31. The FHLBB and FSLIC have been abolished by FIRREA (see *infra* notes 155–56 and accompanying text), and their regulatory and insurance functions redistributed in the federal bank regulatory system. See *infra* notes 150, 158–87 and accompanying text. However, FIRREA makes provision for the continuation of regulations and other administrative actions of these predecessor agencies (see *infra* notes 155–56), and so the recently revised practice and procedure regulations of the FHLBB remain pertinent to the present inquiry.

32. On the previous role of the FHLBB and the FSLIC as thrift regulators, see 1 M. MALLOY, *supra* note 1, at 52–60. Their regulatory and supervisory functions are now performed principally by the DOTS. See *infra* notes 158–80 and accompanying text (discussion of authority of DOTS under FIRREA). The FSLIC deposit insurance function is now performed by the Savings Association Insurance Fund (SAIF) within the FDIC. See *infra* notes 148–50 and accompanying text.

33. On the role of the NCUA as federal regulator of credit unions, see 1 M. MALLOY, *supra* note 1, at 60–65.

34. For a more detailed treatment of the background and provisions of statutory authority underlying these formal enforcement authorities, pre-FIRREA, see Malloy, *Balancing Public Confidence and Confidentiality: Adjudication Practices and Procedures of the Federal Bank Regulatory Agencies*, 61 TEMP. L. REV. 723, 733–48 (1988).

35. 12 U.S.C. §§ 1811–1832 (1988). The FDIA has since been substantially amended by FIRREA, *supra* note 1, §§ 201–226.

36. See 12 U.S.C. §§ 1813(q)(1), 1818(b)(1) (1988) (Comptroller “appropriate Federal banking agency” for cease and desist orders against national banks and officials thereof).

37. See *id.* §§ 1813(q)(2)(A)–(E), 1818(b)(1), (3) (Fed “appropriate Federal banking agency” for cease and desist orders against, *inter alia*, state-chartered, Fed-member banks, and to BHCs and nonbanking subsidiaries of BHCs).

38. See *id.* §§ 1813(q)(3), 1818(b)(1) (FDIC “appropriate Federal banking agency” for cease and desist orders against state-chartered nonmember insured banks).

institutions and SLHCs, respectively.³⁹ FIRREA transferred this authority to the DOTS under the FDIA.⁴⁰

The Federal Credit Union Act (FCUA)⁴¹ granted authority, substantially similar to that of the bank regulators, for the issuance of cease and desist orders as to federally chartered and federally insured credit unions to the NCUA Board and officials thereof.⁴²

2. Temporary Cease and Desist Orders

The Comptroller, the Fed, the FDIC, the NCUA, and—pre-FIRREA—the FHLBB and the FSLIC had each been granted authority as to depository institutions under their respective jurisdictions, to issue temporary cease and desist orders.⁴³ As to depository institutions formerly under the supervision of the FHLBB and the FSLIC, FIRREA has transferred this authority to the DOTS.⁴⁴ The temporary cease and desist power has been available to deal with exigencies such as violations or threatened violations of law or unsafe or unsound practices that are “likely to cause insolvency or substantial dissipation of assets or earnings” of a depository institution or are “likely to seriously weaken [its] condition . . . or otherwise seriously prejudice the interests of its depositors” during the pendency of a cease and desist proceeding.⁴⁵

3. Suspension and Removal

Under specified conditions, the FDIA granted correlative power to the Comptroller and the Fed to remove a director, officer, or person participating in the conduct of the affairs (management participant) of a national bank,⁴⁶ with the Comptroller initiating the removal proceedings and the Fed exclusively determining whether a removal order should issue.⁴⁷ The Fed also exercises removal authority with respect to directors, officers, and management participants of state-chartered Fed-member banks⁴⁸ and of BHCs.⁴⁹ The FDIC exercises removal authority with respect to directors, officers, and management participants of state-chartered, nonmember insured banks.⁵⁰ In addition, each of these regulators had been granted the power to suspend directors and officers and to prohibit participation by management participants, pending the completion of removal proceedings.⁵¹

39. See Malloy, *supra* note 34, at 731 (discussing FHLBB and FSLIC cease and desist authority).

40. See *infra* notes 292–95 and accompanying text.

41. 12 U.S.C. §§ 1751–95 (1988).

42. See *id.* § 1786(e)(1).

43. See 12 U.S.C. §§ 1464(d)(3) (FHLBB authority), 1730(f) (FSLIC), 1786(f) (NCUA), 1813(q), 1818(c)(1) (1988) (temporary cease and desist authority for “appropriate Federal bank agencies”).

44. See *infra* notes 292–95 and accompanying text.

45. 12 U.S.C. § 1818(c)(1) (1988).

46. *Id.* § 1818(e)(1)–(2).

47. *Id.* § 1818(e)(4).

48. *Id.* §§ 1813(q)(2), 1818(e)(1)–(2).

49. See *id.* § 1818(b)(3) (removal provision applicable to BHCs and nonbanking subsidiaries thereof).

50. *Id.* §§ 1813(q)(3), 1818(e)(1)–(2).

51. *Id.* § 1818(e)(3).

Pre-FIRREA, the FHLBB and the FSLIC had exercised suspension and removal authority as to federally chartered thrift associations and as to state-chartered, insured thrift institutions and SLHCs, respectively.⁵² FIRREA has transferred this authority to the DOTS.⁵³

Substantially similar suspension and removal power is exercised by the NCUA as to directors, committee members, officers, and management participants of federally chartered or insured credit unions.⁵⁴

4. Summary Suspension and Removal

In situations in which a director, officer, or management participant of any insured depository institution is charged with a felony involving dishonesty or breach of trust, a relatively summary procedure exists for the suspension and removal, under specified circumstances, of such a person by, depending upon the type of institution, the Comptroller,⁵⁵ the Fed,⁵⁶ the FDIC,⁵⁷ the NCUA,⁵⁸ and—pre-FIRREA—the FHLBB and the FSLIC.⁵⁹ Post-FIRREA, the summary suspension and removal authority of these last two agencies is to be exercised by the DOTS.⁶⁰

5. Civil Money Penalties

Authority to assess civil money penalties, under specified circumstances, is granted under the FDIA to the Comptroller, with respect to national banks and directors, officers, employees, agents, and management participants thereof;⁶¹ to the Fed, with respect to state-chartered, Fed-member banks and officials thereof⁶² and with respect to BHCs and officials thereof;⁶³ and to the FDIC, with respect to state-chartered, nonmember insured banks.⁶⁴

Pre-FIRREA, the FHLBB and the FSLIC had authority to impose civil money penalties as to federally chartered thrift associations and officials thereof and as to

52. See Malloy, *supra* note 34, at 732 (discussing FHLBB and FSLIC suspension and removal authority).

53. See *infra* notes 292–95 and accompanying text.

54. 12 U.S.C. § 1786(g) (1988).

55. *Id.* §§ 1813(q)(1), 1818(g) (Comptroller “appropriate Federal banking agency” for summary suspension and removal proceedings against officials of national banks).

56. *Id.* §§ 1813(q)(2), 1818(g) (Fed “appropriate Federal banking agency” for summary suspension and removal proceedings against officials of state-chartered, Fed-member banks).

57. *Id.* §§ 1813(q)(3), 1818(g) (FDIC “appropriate Federal banking agency” for summary suspension and removal proceedings against officials of state-chartered, nonmember insured banks).

58. *Id.* § 1786(i) (NCUA summary suspension and removal authority with respect to officials of federally chartered or insured credit unions).

59. See *id.* §§ 1464(d)(5), 1730(h) (pre-FIRREA authority of FHLBB and FSLIC to exercise summary suspension and removal power as to officials of federally chartered thrift associations and as to federally insured institutions and SLHCs, respectively).

60. See *infra* notes 292–95 and accompanying text.

61. 12 U.S.C. §§ 1813(q)(1), 1818(i)(2) (1988) (Comptroller “appropriate Federal banking agency” for imposition of civil money penalties against national banks and officials thereof).

62. *Id.* §§ 1813(q)(2), 1818(i)(2) (Fed “appropriate Federal banking agency” for imposition of civil money penalties against state-chartered, Fed-member banks and officials thereof).

63. See *id.* § 1818(b)(3) (civil money penalties provision applicable to BHCs and nonbanking subsidiaries thereof).

64. *Id.* §§ 1813(q)(3), 1818(i)(2) (FDIC “appropriate Federal banking agency” for imposition of civil money penalties against state-chartered, nonmember insured banks and officials thereof).

state-chartered, insured thrift institutions and SLHCs and officials thereof, respectively.⁶⁵ FIRREA has transferred this authority to the DOTS.⁶⁶

Substantially similar civil money penalties authority is exercised by the NCUA under the FCUA as to federally chartered or insured credit unions and officials thereof.⁶⁷

6. Other Enforcement Powers

For present purposes, we shall focus on regulations implementing the formal enforcement powers identified above. There are, however, a broader range of enforcement authorities available to the federal regulators of depository institutions.⁶⁸ Among the more formidable enforcement powers are such authorities as charter revocation⁶⁹ and deposit insurance termination.⁷⁰

Other, more specialized enforcement powers available to these federal regulators include, *inter alia*, (i) civil money penalties provisions for violations of specified provisions of the Federal Reserve Act;⁷¹ (ii) criminal and civil penalty provisions for violations of the Bank Holding Company Act (BHCA);⁷² (iii) civil money penalties provisions for violations of the anti-tying provisions of the BHCA amendments of 1970;⁷³ (iv) enforcement authority under the Depository Institutions Management Interlocks Act (DIMIA),⁷⁴ which intersects the authority granted under the FDIA and the NCUA;⁷⁵ (v) authority under section 12(i) of the Securities Exchange Act of 1934 (1934 Act)⁷⁶ with respect to the securities of depository institutions registered under that act.

B. Recent Pre-FIRREA Revisions of Formal Enforcement Regulations

For the sake of convenience, the discussion that follows will focus upon the FDIC revisions of formal enforcement practice and procedures.⁷⁷ As appropriate, corresponding provisions of the recently revised FHLBB regulations and the proposed OCC revisions will be noted in the context of the provisions of the FDIC revision.⁷⁸

65. See Malloy, *supra* note 34, at 733 (discussing FHLBB and FSLIC civil money penalties authority).

66. See *infra* notes 292-95 and accompanying text.

67. 12 U.S.C. § 1786(k)(2) (1988).

68. See generally Huber, *Enforcement Powers of the Federal Banking Agencies*, 7 ANN. REV. BANKING L. 123 (1987) (exhaustive discussion of range of state and federal criminal and formal and informal civil enforcement authorities).

69. See, e.g., 12 U.S.C. §§ 93 (national bank charters), 1766 (1988) (federal credit union charters).

70. See *id.* § 1818(a).

71. *Id.* §§ 504, 505.

72. *Id.* § 1847.

73. See *id.* § 1972(2)(F).

74. *Id.* §§ 3201-3208. See generally 1 M. MALLOY, *supra* note 1, at 244-45.

75. See, e.g., 12 U.S.C. §§ 1818(e)(3) (violations of DIMIA subject to suspension and removal authority of FDIA), 1786(g)(3) (1988) (same; suspension and removal authority of FCUA).

76. 15 U.S.C. § 78l(i) (1982). See generally 1 M. MALLOY, *supra* note 1, at 491-93. See also *infra* notes 253-56 and accompanying text (discussion of technical amendments to 1934 Act under FIRREA).

77. See *infra* Illustration 1 (comparing provisions of prior and revised FDIC rules of practice and procedure).

78. See *infra* Illustration 2 (contrasting corresponding provisions of formal enforcement regulations of the federal

On December 22, 1988, the FDIC published in final form a revision of its rules of practice and procedures.⁷⁹ Among other things, the revision had the effect, in certain respects, of substantially revising the rules applicable to formal enforcement proceedings with respect to cease and desist orders, temporary cease and desist orders, suspensions and removals, and civil money penalties.⁸⁰ The revised rules are applicable to any proceeding instituted after January 1, 1989.⁸¹

Proceedings commence under the revised regulations with the issuance of a notice.⁸² The notice must set forth the basis for FDIC jurisdiction in the proceeding, the claim showing that the FDIC is entitled to relief, and a prayer for relief.⁸³ The notice must also advise the respondent⁸⁴ that an answer⁸⁵ must be filed within twenty days after service of the notice,⁸⁶ and that a hearing on the notice will be held within a specified judicial district⁸⁷ at a specified time.⁸⁸ Furthermore, in FDIA civil money

regulators). In fact, parallels between the FDIC revisions, promulgated in December 1988, and the FHLBB revisions, promulgated in June 1989, were quite conscious. See 54 Fed. Reg. 26,350 (1989):

The [FHLBB] notes that the [FDIC], which has similar enforcement authority with respect to federally insured banks, recently adopted extensive revisions to its own rules of practice and procedure. . . . The [FHLBB]'s staff has been in contact with the FDIC staff about our common interests in revising and updating the hearing procedures for both agencies. Many of the revisions being adopted by the [FHLBB] today closely resemble the rules adopted by the FDIC.

See also 54 Fed. Reg. 26,350-51 (1989) (FHLBB discussion of comments incorporating comments received by FDIC on its proposed revision).

79. 53 Fed. Reg. 51,656 (1988) (codified at 12 C.F.R. pt. 308).

80. See 53 Fed. Reg. 51,659-66 (1988) (agency discussion of changes in generally applicable rules of practice); *id.* at 51,667 (discussion of clarifying amendments to rules and procedures applicable to cease and desist proceedings); *id.* (discussion of clarifying amendments to rules and procedures applicable to suspensions and removals); *id.* (discussion of changes in rules and procedures applicable to civil money penalties proceedings); *id.* at 51,668 (discussion of changes in rules and procedures applicable to summary suspensions and removals).

81. 12 C.F.R. § 308.03(a)(1) (1989). For pre-revision proceedings, the revised rules may be applied if the parties, with the consent of the administrative law judge (ALJ), agree. *Id.* § 308.03(a)(2). The FHLBB revised rules are applicable to all formal enforcement proceedings in which the notice initiating the proceeding is issued after June 23, 1989, the publication date of the FHLBB revisions in final form. See 54 Fed. Reg. at 26,350 (1989).

82. 12 C.F.R. § 308.20(a) (1989). For these purposes, "notice" is defined as "the entire document issued by the [FDIC] Board of Directors or its designee which is served upon a party and which initiates a proceeding conducted under [12 C.F.R. pt. 308]." *Id.* § 308.01(j). For the generally applicable rules with respect to service of papers, see *id.* § 308.13. On the grounds for issuance of a notice in a cease and desist proceeding, see *id.* § 308.65. On the grounds for issuance of a notice in a removal proceeding, see *id.* § 308.70.

On the notice in FHLBB proceedings, see *id.* § 509.13. On service of papers, see *id.* § 509.9.

On the notice in the OCC proposed revision, see 54 Fed. Reg. 22,769 (1989) (to be codified at 12 C.F.R. § 19.10(a)). On service of papers, see 54 Fed. Reg. at 22,770 (1989) (to be codified at 12 C.F.R. § 19.11(c),(d)).

83. 12 C.F.R. § 308.20(b)(1)(i)-(iii) (1989). A proposed order may be served instead of, or as a supplement to, the prayer for relief. *Id.* § 308.20(b)(1)(iii).

84. The "Respondent" is defined as "any person against whom the FDIC seeks relief in the Notice." *Id.* § 308.01(n).

85. For the generally applicable procedural rules with respect to the answer, see *id.* § 308.21. For the corresponding provisions under the FHLBB rules, see *id.* § 509.14. For the corresponding provisions of the OCC proposed revision, see 54 Fed. Reg. 22,769 (1989) (to be codified at 12 C.F.R. § 19.10(b)-(d)).

86. On time limits generally, see 12 C.F.R. § 308.14 (1989). For extension of time for filing the notice, for good cause shown, see *id.* § 308.21(a)(2). See also *id.* § 308.15 (generally applicable rules with respect to extensions of time limits).

87. See *id.* § 308.20(b)(2)(iv).

88. In cease and desist proceedings or removal proceedings (including proceedings to prohibit further participation by a management participant), the hearing must commence within 60 days after service of the notice. *Id.* § 308.20(b)(2)(v)(A). In all other proceedings, the hearing must commence within 120 days. *Id.* § 308.20(b)(2)(v)(B).

penalty proceedings, the notice must advise the respondent that a request for a hearing must be filed⁸⁹ within ten days after service of the notice.⁹⁰

A notice or answer may be amended or supplemented, upon good cause shown, by leave of the administrative law judge (ALJ)⁹¹ appointed by the Office of Personnel Management (OPM), at the FDIC Executive Secretary's instance,⁹² after receipt of the answer in the proceeding.⁹³

Discovery is limited to documentary discovery.⁹⁴ Privileged material is not discoverable,⁹⁵ but all other relevant documents, whether or not admissible at hearing,⁹⁶ are generally discoverable.⁹⁷

At the conclusion of a hearing,⁹⁸ each party⁹⁹ is required to file with the ALJ proposed findings of facts, proposed conclusions of law, a proposed order,¹⁰⁰ and may in addition file a post-hearing brief.¹⁰¹ All such post-hearing filings must be made within thirty days after the hearing transcript is delivered to all parties or filed, whichever is earlier.¹⁰² Any party that files proposed findings of fact and conclusions of law and a post-hearing brief is permitted to file a reply brief within fifteen days

89. For generally applicable rules with respect to filings, see *id.* § 308.12. On the corresponding provisions under the FHLBB rules, see *id.* § 509.10. For the corresponding provisions of the OCC proposed revision, see 54 Fed. Reg. 22,769 (1989) (to be codified at 12 C.F.R. § 19.11(a),(b)).

90. 12 C.F.R. § 308.20(b)(2)(iii) (1989). On the corresponding provisions under the FHLBB rules, see *id.* § 509.34. For the corresponding provisions of the OCC proposed revision, see 54 Fed. Reg. 22,776 (1989) (to be codified at 12 C.F.R. § 19.81).

91. 12 C.F.R. § 308.22(a) (1989). On the powers of the ALJ generally, see *id.* § 308.07.

92. On the authority of the Executive Secretary with respect to formal enforcement proceedings, see *id.* § 308.05(b).

93. *Id.* § 308.06(b)(1). This practice of obtaining ALJs from other agencies, through the OPM, is the standard practice among all the federal regulators of depository institutions. See Malloy, *supra* note 34, at 728, 795. This practice is inconsistent with explicit provisions of federal administrative law. See 5 U.S.C. § 3105 (1982). The practice has been the subject of recent criticism (see *infra* notes 357–60 and accompanying text) and its discontinuance has been mandated by FIRREA. See *infra* note 363 and accompanying text. The corresponding provisions of the FHLBB rules are equally deficient. See 12 C.F.R. § 509.3(a) (1989). The OCC proposed revision does not address the issue.

94. 12 C.F.R. § 308.25(a) (1989). *But cf. id.* § 308.29 (permitting depositions of witnesses unavailable for hearing). On the time limits applicable to discovery, see *id.* § 308.26. On discovery rules, see *id.* §§ 308.27 (document discovery from parties), 308.28 (non-parties). These rules are relatively more extensive than the discovery rules under the prior FDIC practice and procedure rules. See Malloy, *supra* note 34, at 763 (FDIC rules “characteristically thin on such matters as rules of evidence and discovery”). On the corresponding provisions under the FHLBB rules, see 12 C.F.R. § 509.21 (1989). For the corresponding provisions of the OCC proposed revision, see 54 Fed. Reg. 22,772 (1989) (to be codified at 12 C.F.R. § 19.33).

95. 12 C.F.R. § 308.25(c) (1989).

96. On rules of evidence under the revised rules, see *id.* § 308.38.

97. See *id.* § 308.25(b): “It is not a ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”

98. For rules concerning practice and procedures with respect to hearings, see *id.* §§ 308.32 (scheduling of hearing), 308.34 (general rules with respect to time for commencement of hearing, effect of failure to appear), 308.35 (hearing subpoenas), 308.36 (conduct of hearings). See also *id.* §§ 308.33 (prehearing submissions and conferences), 308.37 (written testimony in lieu of oral hearing).

99. For purposes of these rules, the term “party” is defined to mean “a person named or admitted as a party for some or all purposes.” *Id.* § 308.01(f). *Cf. id.* §§ 308.23(b) (intervention; persons with “official interest” in the substance of proceedings), 308.24 (consolidation and severance of actions “for some or all purposes”).

100. *Id.* § 308.39(a)(1)–(3). On the corresponding provisions under the FHLBB rules, see 54 Fed. Reg. 26,359 (1989) (codified at 12 C.F.R. § 509.27(a)). For the corresponding provisions of the OCC proposed revision, see 54 Fed. Reg. 22,774 (1989) (to be codified at 12 C.F.R. § 19.50).

101. 12 C.F.R. § 308.39(a) (1989). See 54 Fed. Reg. 26,359 (1989) (codified at 12 C.F.R. § 509.27(a)) (corresponding FHLBB provision). See also 54 Fed. Reg. 22,774 (1989) (to be codified at 12 C.F.R. § 19.50) (corresponding OCC proposed provision).

102. 12 C.F.R. § 308.39(a) (1989).

after the end of that thirty-day period.¹⁰³ Reply briefs are limited to responses to new matters, issues, and arguments raised in another party's papers.¹⁰⁴

Within fifty days after the end of that thirty-day period, the ALJ is required to file with the FDIC Executive Secretary the record of the proceeding, including, *inter alia*, the ALJ's recommended decision, findings of fact, conclusions of law, and proposed order.¹⁰⁵ At the same time, the ALJ is required to serve upon each party a copy of the recommended decision, findings, conclusions, and proposed order.¹⁰⁶ Within twenty days of such service upon the parties, exceptions to the recommended decision may be filed by any party with the Executive Secretary.¹⁰⁷ After the expiration of the time for filing exceptions, the Executive Secretary submits the official record¹⁰⁸ of the action to the FDIC Board and notifies the party of this submission.¹⁰⁹ Generally within ninety days of submission,¹¹⁰ the Board is required to issue its decision.¹¹¹

These general rules are applicable to cease and desist proceedings, but not to the issuance of a temporary cease and desist order.¹¹² Similarly, the general rules are applicable to removal proceedings, but not to the issuance of a temporary suspension order.¹¹³ Summary suspension and removal proceedings are governed by a separate set of rules and procedures.¹¹⁴

The general rules also apply to FDIA civil money penalty proceedings.¹¹⁵ How-

103. *Id.* § 308.39(b).

104. *Id.*

105. *Id.* § 308.40(a)(1). On the corresponding provisions under the FHLBB rules, see 54 Fed. Reg. 26,359 (1989) (codified at 12 C.F.R. § 509.27(b)). The corresponding provision in the OCC revision would generally give 45 days for the filing of the recommended decision of the "presiding officer" (see 54 Fed. Reg. 22,774 (1989) (to be codified at 12 C.F.R. § 19.52(a))) and would allow the recommended decision to become the final decision of the Comptroller 30 days after receipt thereof, with certain specified exceptions. See 54 Fed. Reg. 22,775 (1989) (to be codified at 12 C.F.R. § 19.52(b)).

106. 12 C.F.R. § 308.40(a)(2) (1989).

107. *Id.* § 308.41(a)(1). On the corresponding provisions under the FHLBB rules, see 54 Fed. Reg. 26,368 (1989) (codified at 12 C.F.R. § 509.29(a)). The OCC proposed revision provides for an administrative appeal process and review by the Comptroller of the recommended decision. See 54 Fed. Reg. 22,775 (1989) (to be codified at 12 C.F.R. §§ 19.60–19.61).

108. On the maintenance of the official record, see 12 C.F.R. § 308.11 (1989).

109. *Id.* § 308.42. On the corresponding provisions under the FHLBB rules, see 54 Fed. Reg. 26,369 (1989) (codified at 12 C.F.R. § 509.31). For the corresponding provisions of the OCC proposed revision, see 54 Fed. Reg. 22,775 (1989) (to be codified at 12 C.F.R. § 19.62).

110. Where the FDIC Board grants a written request for post-hearing oral argument before the Board, *per* 12 C.F.R. § 308.43 (1989), the decision is required within 90 days after submission, or 30 days after oral argument, whichever is later. *Id.* § 308.44(a).

111. *Id.* § 308.44(a). However, the Board may in the interim set aside the notice of submission and remand the case or any aspect thereof to the ALJ for further proceedings. See *id.* § 308.44(b). On the corresponding provisions under the FHLBB rules, see 54 Fed. Reg. 26,369 (1989) (codified at 12 C.F.R. § 509.32). For the corresponding provisions of the OCC proposed revision, see 54 Fed. Reg. 22,775 (1989) (to be codified at 12 C.F.R. § 19.63).

112. See 12 C.F.R. §§ 308.64(a), 308.68(c) (1989). For procedures governing issuance of temporary cease and desist orders, see *id.* § 308.68.

113. See *id.* §§ 308.69, 308.73(c). For procedures governing issuance of temporary suspension orders, see *id.* § 308.73.

114. See *id.* §§ 308.104–308.107.

115. See *id.* § 308.74(a)(1). Unlike the FDIC revised rules, the FHLBB revised rules for the most part do not break out separate subparts detailing rules of practice and procedure specifically applicable to different types of formal enforcement actions, in addition to the generally applicable rules. See *id.* § 509.1 (general statement of scope of FHLBB revised rules). But see 54 Fed. Reg. 26,369 (1989) (codified at 12 C.F.R. §§ 509.33–509.38) (specific FHLBB revised rules for civil money penalty proceedings). See also 12 C.F.R. pt. 509a (1989) (unrevised FHLBB rules governing

ever, civil penalties are assessed upon service of the notice commencing the proceedings.¹¹⁶ The hearing procedures of the general rules are not triggered unless the respondent affirmatively requests a hearing.¹¹⁷ Furthermore, the notice of assessment automatically becomes final and unappealable unless the respondent affirmatively requests a hearing and answers the notice in accordance with the general rules.¹¹⁸

III. SELECTIVE OVERVIEW OF FIRREA

Dramatic proposals for thorough realignment of the regulatory system¹¹⁹ have tended to be overshadowed by the need for solutions to other, more immediate crises facing depository institutions. Such has been the case recently, as losses in the savings associations industry reached record heights.¹²⁰

In early February 1989 the President announced a program intended to ensure that the many financially troubled thrift institutions were dealt with promptly, with due regard for the safety of insured depositors of such institutions.¹²¹ Under the program, a large number of such institutions were placed under the jurisdiction and oversight of a joint team of regulatory agencies headed by the FDIC.¹²² The joint team consisted of the FDIC, the FHLBB, the FSLIC, the OCC, and the Fed.¹²³ The immediate objectives of the program were to establish control and oversight of each troubled institution; to promote confidence and maintain customer services; to evaluate each such institution's condition and identify and account for all losses; to ensure the safe and sound operation of the institutions; and to recommend the most viable alternatives for the cost-effective resolution of each institution's case.¹²⁴ Taking hold of the program, the FDIC shortly announced its intention to dispose of real estate assets turned over to it as it "resolved" insolvencies in the thrift industry, neither holding such assets in anticipation of future appreciation, nor "dumping" the assets on the market below current value.¹²⁵

Clearly the most significant development in this context—and possibly in this decade—was the plan to restructure the regulation of savings associations, also

summary suspension and removal proceedings). The OCC proposed revision goes to the other extreme, sprinkling the corresponding rules over a multitude of subparts, beyond the sensible and orderly arrangement made by the FDIC rules. See 54 Fed. Reg. 22,765–766 (1989) (cross reference chart comparing existing OCC provisions and proposed revisions; general procedural rules contained in not one, but six subparts).

116. 12 C.F.R. § 308.75(a) (1989).

117. See *id.* §§ 308.20(b)(2)(ii), 308.75(a)(1).

118. See *id.* § 308.75(a)(1)–(2).

119. Cf. I M. MALLOY, *supra* note 1, at 76–77, discussing recommendations for reform of federal regulation of financial services presented by Report of the Task Group on Regulation of Financial Services (1984).

120. See, e.g., Nash, *Savings Loss Put at \$2.3 Billion*, N.Y. Times, Mar. 22, 1989, at D1, col. 6 (reporting 1988 fourth-quarter deficit in savings industry that brought 1988 total to record \$12.1 billion deficit). Deposit withdrawals at thrifts were also setting record highs. See Nash, *Savings and Loan Withdrawals In December a Record \$8.1 Billion*, N.Y. Times, Feb. 11, 1989, at 1, col. 4.

121. See FDIC Release PR-41-89, Feb. 24, 1989, reprinted in [1988–1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 87,600 (Mar. 3, 1989).

122. *Id.* at 94,644.

123. *Id.*

124. *Id.* at 94,644–94,645.

125. FDIC Release PR-44-89, Mar. 1, 1989, reprinted in Fed. Banking L. Rep. (CCH) ¶ 87,605 (Mar. 17, 1989).

Illustration 1

Comparison of Prior and Revised FDIC Regulations

*Significantly expanded provision

†Substantially parallel provisions

‡No corresponding provision

All references are to 12 C.F.R.

Provision	Prior (1988)	Revised (1989)
<i>General Provisions</i>		
General definitions	308.01	308.01
Rules of construction	308.02	308.02*
Transition rules	‡	308.03
<i>Rules of Practice</i>		
Scope	308.03	308.04*
Authority of Board and Executive Secretary	‡	308.05
Appointment of administrative law judges	308.07(a)	308.06*
Powers of administrative law judges	308.07(b)	308.07
	308.08(b)(9)	
Appearance and practice before the FDIC	308.04	308.08*
		308.47*
		308.50*
Short and plain statement required	‡	308.09
Good faith certification	‡	308.10
Maintenance of the record	‡	308.11
Filing and service of papers	308.19(a)	308.12
	308.21	308.13
	308.22(b)	
Time limits	308.22	308.14*
		308.15*
Witness fees and expenses	308.10	308.16*
Unilateral settlement offers to the Board	308.07(f)	308.17*
Confidentiality	308.20	308.18*
FDIC's right to conduct examinations is unaffected	‡	308.19
The notice	308.05	308.20*
The answer	308.06	308.21*
Amending pleadings	‡	308.22
Intervention; persons having official interest	308.07(f)	308.23*
Consolidation and severance of actions	‡	308.24
Scope of discovery	‡	308.25
Time limits for discovery	‡	308.26
Document discovery from parties	308.08	308.27
Document subpoenas to nonparties	308.08	308.28
Depositions of witnesses unavailable for hearing	308.08(a)(2)	308.29*
	308.09	
Motions	308.12	308.30
Interlocutory appeals to the Board	‡	308.31
General procedures	‡	308.32
Prehearing submissions and conferences	308.07(e)	308.33*
Hearings	‡	308.34
Hearing subpoenas	308.08	308.35
Conduct of hearings	308.07	308.36 ^a
Written testimony in lieu of oral hearing	‡	308.37
Evidence	308.11	308.38*
Post-hearing papers	308.13(a)†	308.39†
Recommended decision and filing of record	308.13(b)	308.40*
Exceptions to recommended decision	308.14	308.41
	308.15	

(continued)

Illustration 1 (continued)

Comparison of Prior and Revised FDIC Regulations

*Significantly expanded provision

†Substantially parallel provisions

‡No corresponding provision

All references are to 12 C.F.R.

Provision	Prior (1988)	Revised (1989)
Notice of submission to the Board	308.16†	308.42†
Post-hearing oral argument before the Board	308.17†	308.43†
Decision by the Board	308.18	308.44*
Stays pending appeal	308.36(b)	308.45
	308.43	
Collateral attacks on administrative proceedings	‡	308.46
Conflicts of interest	‡	308.47
Ex parte communications	308.07(c)	308.48
Sanctions	‡	308.49
Suspension and disbarment	308.04(b)	308.50*
<i>Cease and Desist Proceedings</i>		
Scope	308.32†	308.64†
Grounds for cease and desist orders	308.33†	308.65†
	308.38†	
Notice to state supervisory authority	308.34†	308.66†
Notice of charges and of hearing, and consent	308.35	‡
Effective date of order and service on bank	308.36(b)	308.67
Temporary cease and desist order	308.37	308.68
<i>Suspension and Removal</i>		
Scope	308.39	308.69
Grounds for removal or prohibition	308.40†	308.70†
Notice to state supervisory authority	308.41†	308.71†
Notice of intention to remove, hearing and consent	308.42	‡
Effective date of removal or prohibition order	308.43†	308.72†
Grounds for suspension or prohibition	308.44†	308.73(a)(1)†
Temporary suspension order	308.45†	308.73(a)(2)†
		308.73(b)†
Extraterritorial acts of officials of foreign banks	308.46	‡
<i>Civil Money Penalties</i>		
Scope	308.64†	308.74†
Violation of order or directive as grounds for assessment	308.65	‡
Violation of laws limiting dealings with bank officials and affiliates as ground for assessment	308.66	‡
Violation of law governing correspondent accounts as ground for assessment	308.67	‡
Relevant considerations	308.68†	308.75(b)†
Assessment of penalties	[308.69]	308.75
Waiver of hearing	308.70†	308.75(a)†
Effective date of, and payment under, an order to pay	308.72	308.76
<i>Summary Suspension and Removal</i>		
Scope	308.55(a),(b)†	308.104†
Relevant considerations	308.56(a)†	308.105†
Notice of suspension, and orders of removal or prohibition	308.57†	308.106†
	308.58†	
	308.59†	
Hearings	308.60†	308.107†
	308.61†	
	308.62†	
Reconsideration by the Board of Directors	308.63	‡

Illustration 2

Comparison of Agency Regulations

*Covered by "General Provisions"

†Covered by "Rules of Practice"

‡No corresponding provision

All references are to 12 C.F.R.^a

Provision	Revised FDIC	Revised FHLBB	Proposed OCC	Fed	NCUA ^b
<i>General Provisions</i>					
Scope of regulations	‡	509.1	19.0	‡	747.01
General definitions	308.01	509.2	19.1	†	‡
Rules of construction	308.02	‡	‡	‡	‡
Transition rules	308.03	‡	‡	‡	‡
<i>Rules of Practice</i>					
Definitions	*	*	*	263.2	‡
Scope	308.04	*	*	263.1(b)	747.101
Authority of agency	308.05	‡	‡	263.1(a)	‡
Purpose	‡	‡	‡	263.1(b)	‡
Appointment of administrative law judges	308.06	509.3	19.1(k)	263.6(a)	747.106(a)
Powers of administrative law judges	308.07	509.4	19.41	263.6(b)	747.106(b)
Appearance before the agency	308.08	509.5	19.3	263.3	747.102
Short and plain statement required	308.09	‡	‡	‡	‡
Good faith certification	308.10	509.6	19.13	‡	‡
Maintenance of the record	308.11	509.8	‡	‡	‡
Filing of papers	308.12	509.10	19.11(a),(b)	263.16	747.116
Service of papers	308.13	509.9	19.11(c),(d)	263.17 263.19(b)	747.117 747.119(b)
Formal requirements as to papers filed	308.12(a)	509.11	19.12	263.21	747.121
Construction of time limits	308.14	509.12	19.5(a)	263.19	747.119
Time limits	308.15	‡	19.5(b),(c)	‡	‡
Witness fees and expenses	308.16	509.22(d)	19.34(c)	263.7(d)(2)	747.107(i)
Unilateral settlement offers to the Board	308.17	509.20	‡	263.5(e)	747.104(e)
Confidentiality	308.18	509.25	19.43 19.44	263.20	747.120
Agency's right to conduct examinations is unaffected	308.19	‡	19.2	‡	‡
The notice	308.20	509.13	19.10(a)	263.4	747.103
The answer	308.21	509.14	19.10(b)–(d)	263.5	747.104
Amending pleadings	308.22	509.15	19.10(a),(b)	263.4	‡
Intervention; persons having official interest	308.23	509.25(a)	19.21	263.6(d)	747.106(d)
Consolidation and severance of actions	308.24	509.16	‡	‡	‡
Scope of discovery	308.25	509.21(b)	19.33	‡	‡
Time limits for discovery	308.26	509.21(h)	‡	‡	‡
Document discovery from parties	308.27	509.21	‡	‡	‡
Subpoenas	‡	‡	19.34	263.7	747.107
Document subpoenas to nonparties	308.28	509.22	‡	‡	‡
Depositions	‡	‡	‡	263.8	747.107(f)–(h)
Depositions of witnesses unavailable for hearing	308.29	509.23	‡	‡	‡
Motions	308.30	509.17	19.14	263.10	747.109
Interlocutory appeals to the Board	308.31	509.18	19.15	263.10(e)	747.109(e)
General procedures	308.32	‡	‡	‡	‡
Prehearing submissions and conferences	308.33	509.19	19.30 19.31 19.32	263.6(c)	747.106(c)

(continued)

Illustration 2 (continued)

Comparison of Agency Regulations

*Covered by "General Provisions"

†Covered by "Rules of Practice"

‡No corresponding provision

All references are to 12 C.F.R.^a

Provision	Revised FDIC	Revised FHLBB	Proposed OCC	Fed	NCUA ^b
Hearings	308.34	‡	‡	‡	‡
Hearing subpoenas	308.35	509.22	‡	‡	‡
Conduct of hearings	308.36	509.24	19.40	263.6	747.106
Written testimony in lieu of oral hearing	308.37	‡	‡	‡	‡
Evidence	308.38	509.24(a),(b)	19.42(a)	263.9	747.108
Post-hearing papers	308.39	509.27(a)	19.50 19.51	263.11(a)	747.110(a)
Recommended decision and filing of record	308.40	509.27(b)	19.52	263.11(b)	747.110(b)
Briefs	‡	509.28	19.60(b)–(d)	263.13	747.112
Exceptions to recommended decision	308.41	509.29	19.60	263.12	747.111
Notice of submission to the regulator	308.42	509.31	19.62	‡	747.114
Post-hearing oral argument before the regulator	308.43	509.30	19.61	263.14	747.113
Decision by the regulator	308.44	509.32	19.64	263.15	747.115
Stays pending appeal	308.45	‡	19.65	‡	‡
Collateral attacks on administrative proceedings	308.46	‡	‡	‡	‡
Conflicts of interest	308.47	509.5(b)	19.3(b)	‡	‡
Ex parte communications	308.48	509.7	19.4	263.6(h)	‡
Sanctions	308.49	509.5(c)	19.4(c),(d)	263.6(h)(2)	‡
Suspension and disbarment	308.50	‡	19.140–19.151	263.3(b)	747.102(b)
<i>Cease and Desist Proceedings</i>					
Scope	308.64	*	19.70	†	747.301
Grounds for cease and desist orders	308.65	‡	‡	‡	747.302
Notice to state supervisory authority	308.66	‡	‡	‡	747.101(c)
Notice of charges and of hearing, and consent	‡	†	19.71	†	747.303
Effective date of order and service on bank	308.67	‡	19.72	‡	747.304 747.305
Temporary cease and desist order	308.68	‡	‡	†	747.306
<i>Suspension and Removal</i>					
Scope	308.69	*	19.90	†	747.501
Grounds for removal or prohibition	308.70	‡	‡	‡	747.502
Notice to state supervisory authority	308.71	‡	‡	‡	747.101(c)
Notice of intention to remove, hearing and consent	‡	†	19.91	†	747.503
Effective date of removal or prohibition order	308.72	‡	19.92	†	747.504
Temporary suspension order	308.73	‡	‡	‡	747.505
Remainder of the board of institution	‡	‡	‡	‡	747.506
<i>Civil Money Penalties</i>					
Purpose	‡	‡	‡	263.22	‡
Scope	308.74	509.33	19.80	263.22	747.401
Grounds	‡	‡	‡	‡	747.402
Assessment of penalties	308.75	509.34	19.81	263.23	747.404
Opportunity for informal hearing	‡	‡	‡	263.24	‡
Request for hearing	‡	‡	19.81	263.26	747.407
Hearing order	‡	‡	‡	263.27	747.408

(continued)

Illustration 2 (continued)

Comparison of Agency Regulations

*Covered by "General Provisions"

†Covered by "Rules of Practice"

‡No corresponding provision

All references are to 12 C.F.R.^a

Provision	Revised FDIC	Revised FHLBB	Proposed OCC	Fed	NCUA ^b
Notice of hearing	‡	509.35	19.82	†	747.406
Relevant considerations	308.75(b)	509.38	‡	263.25	747.403
Effective date of, and payment under, an order to pay	308.76	509.36 509.37	19.83	263.28 263.29	747.405 747.408
<i>Summary Suspension and Removal</i>					
Purpose	‡	‡	‡	263.30	‡
Scope	308.104	509a.1 ^c	19.100	263.30	747.601
Definitions	*	509a.2	*	†	‡
Rules of practice	‡	‡	‡	‡	747.602
Notice of suspension, and orders of removal or prohibition	308.106	509a.3 509a.4	19.101	263.312	747.603 747.604
Effectiveness of suspension or removal until completion of hearing	‡	‡	‡	‡	747.605
Hearings	308.107	509a.5 509a.6 509a.7	19.102	263.32 263.33	747.606 747.607
Default	308.107(d)	509a.8	‡	‡	747.608(c)
Rules of evidence	308.107(b)(3)	509a.9	19.102(d)(2)	263.33(c)(1)	747.607(c)
Burden of persuasion	‡	509a.10	‡	‡	‡
Relevant considerations	308.105	509a.11	‡	‡	747.611
Proposed findings and conclusions and recommended decisions	308.107(b)(8)-(9)	509a.12	19.103(a)	263.33(e)	747.607(e)
Decision of the agency	308.107(e)	509a.13	19.103(b)	263.34	747.609
Miscellaneous provision	308.107(b)(2)	509a.14	‡	‡	‡
Reconsideration by the regulator	‡	‡	19.103(e)	‡	747.610

^aThe revised FHLBB rules can also be found beginning at 54 Fed. Reg. 26,359 (1989). The proposed OCC rules can be found beginning at 54 Fed. Reg. 22,759 (1989).

^bIn October 1989 the NCUA promulgated in final form substantial revisions of its regulations governing administrative actions, adjudicative hearings and rules of practice and procedure. 54 Fed. Reg. 43,280 (1989) (codified at 12 C.F.R. §§ 747.01, 747.101, 747.122, 747.301-747.306, 747.401-747.409, 747.501-747.507, 747.601-747.611). The revision was intended to conform these regulations to certain changes and clarifications mandated by FIRREA. *See id.* at 43,281 (discussing background of the revision). In addition, the NCUA published for comment a proposed rulemaking intended to clarify NCUA authority to conduct formal and informal investigations. 54 Fed. Reg. 43,299 (1989) (to be codified at 12 C.F.R. §§ 747.1001-747.1003, 747.1101-747.1107). These proposed amendments also relate to clarifications of NCUA authority under FIRREA. *See id.* at 43,299.

^c12 C.F.R. pt. 509a, concerning summary suspension and removal, was not included in the June 1989 revision by the FHLBB.

announced by President Bush in early February 1989.¹²⁶ Immediately upon the announcement of the proposal, the FSLIC and the FDIC initiated joint supervisory efforts with respect to resolution of specific thrift institution problems, with the FDIC

126. *See President's Plan to Restructure Regulation of Thrifts*, Am. Banker, Feb. 8, 1989, at 4, col. 1 (reproducing the text of fact sheet, released February 6, 1989, that detailed the President's reform proposal). *See also* Dowd, *Bush Savings Plan Calls for Sharing the Cost Broadly*, N.Y. Times, Feb. 7, 1989, at A1, col. 1; Murray & Thomas, *Dinosaur Industry: Bush's New Solution For Problems of S&Ls Could Kill Them Off*, Wall St. J., Feb. 7, 1989, at A1, col. 6.

assuming supervisory control over insolvent thrifts.¹²⁷ It was estimated at the time that some 350 insolvent thrift institutions might eventually be involved.¹²⁸

While the proposal received a generally favorable initial reaction,¹²⁹ questions were almost immediately raised concerning the cost¹³⁰ and sufficiency of the proposal.¹³¹ Nor was the proposal popular with the thrift industry itself.¹³²

By mid-February 1989 the Bush Administration released a summary of legislation for an expanded proposal for resolution of the thrift crisis.¹³³ The expanded proposal made clear the enhanced role of the FDIC in the regulation of depository institutions.¹³⁴ In addition, among other things, the expanded proposal contemplated enhanced authority for the acquisition of thrift institutions by bank holding companies,¹³⁵ and an elimination of "cross-marketing" restrictions that applied to the marketing of bank-originated products through affiliated nonbank institutions.¹³⁶

The proposed FIRREA received relatively swift congressional consideration. The proposed legislation was introduced in the Senate on February 22, 1989,¹³⁷ and was approved by the Senate, substantially as proposed, on April 19, 1989.¹³⁸ The proposed legislation was later approved in modified form by the House of Representatives.¹³⁹ The final version of the FIRREA was approved by the Senate and the House on August 4, 1989,¹⁴⁰ and on August 9, 1989, the President signed H.R. 1278 into law.¹⁴¹

127. See McTague, *FDIC Takes Control of 222 S&Ls*, Am. Banker, Feb. 8, 1989, at 1, col. 2 (FDIC in effect begins administrative merger with FSLIC under the terms of a management contract between the two agencies); Nash, *Bank Regulators Assuming Control of 4 Savings Units*, N.Y. Times, Feb. 8, 1989, at A1, col. 1; Nash, *Six Savings Institutions Taken Over by the U.S.*, N.Y. Times, Feb. 11, 1989, at 36, col. 1.

128. Nash, *U.S. Weighing Plan to Take Over 350 Insolvent Savings Institutions*, N.Y. Times, Feb. 5, 1989, § 1, at 1, col. 1.

129. See, e.g., Garsson, *While Welcomed as a First Step, Plan Faces Big Changes*, Am. Banker, Feb. 8, 1989, at 2, col. 1.

130. See, e.g., Nash, *Savings Rescue to Cost Taxpayers An Extra \$20 Billion, Data Show*, N.Y. Times, Feb. 10, 1989, at A1, col. 4; Nash, *Taxpayer Cost of Bailouts Put at \$80 Billion*, N.Y. Times, Feb. 17, 1989, at D1, col. 3. Whatever the cost, early reaction appeared to indicate that it was unlikely that the industry cost of the proposal would be passed along to consumers, given the competitive nature of the market. See Celis, *Banks, Thrifts Unlikely to Pass Along Costs of Bailout, Some Executives Say*, Wall St. J., Feb. 8, 1989, at A2, col. 2.

131. See, e.g., Duke & Thomas, *Thrift Rescue Plan Is Subject of Doubts*, Wall St. J., Feb. 8, 1989, at A2, col. 2 (reporting questions concerning whether the size and pace of the proposed plan was sufficient); Ringer, *\$50 Million to Track Down Fraud Termed 'Window Dressing'*, Am. Banker, Feb. 8, 1989, at 14, col. 1.

132. See, e.g., Rosenstein, *Trade Groups Cite Difficulty of Meeting 6% Capital Standard*, Am. Banker, Feb. 8, 1989, at 2, col. 1; McTague, *Bush S&L Plan Draws Heavy Fire*, Am. Banker, Feb. 16, 1989, at 1, col. 2.

133. See *Bush Plan to Solve the Savings and Loan Problem*, Am. Banker, Feb. 16, 1989, at 4, col. 1 [hereinafter "Proposal Summary"] (reproducing the text of detailed summary, released February 14, 1989, that outlined the President's expanded reform proposal).

134. See *id.* See also Garsson, *Studies of Bush Plan Uncover A Vastly More Powerful FDIC*, Am. Banker, Mar. 13, 1989, at 1, col. 2; Nash, *Concern Grows on F.D.I.C. Power*, N.Y. Times, Mar. 20, 1989, at D1, col. 3; Duke, *'Dual Banking' Faces a Possibly Crippling Blow In Bush's Plan to Curb State Powers Over S&Ls*, Wall St. J., Apr. 11, 1989, at A24, col. 1.

135. See Proposal Summary, *supra* note 133, at 8.

136. See *id.*

137. See 135 CONG. REC. S1513 (daily ed. Feb. 22, 1989) (introducing S.413).

138. 135 CONG. REC. S4238 (daily ed. Apr. 19, 1989) (passage of S.774).

139. See 135 CONG. REC. H2602 (daily ed. June 15, 1989) (substitution of H.R. 1278).

140. *Id.* at S10,214; 135 CONG. REC. H5315 (daily ed. Aug. 4, 1989).

141. Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified at scattered sections of 12 and 15 U.S.C.).

The discussion that follows in this section summarizes some of the principal features of the FIRREA. More detailed analysis of the provisions of the FIRREA concerned with regulatory enforcement powers and procedures will be presented in the next section.

A. *Regulatory Realignment*

The FIRREA works a number of very significant changes in the regulatory environment, both directly and indirectly related to the stated "reform" purposes of the legislation.¹⁴² Some indication of the nature of the fundamental realignment of the regulatory system underlying the legislation may be suggested by a shift in terminology; the FDIA¹⁴³ will now generally refer to "insured depository institutions"¹⁴⁴ rather than "insured banks."¹⁴⁵ Thus, federal regulation has taken a further step towards realignment around a unifying, functional concept like "depository institution" as its basic frame of reference.

This realignment has certain concrete consequences for the structure of federal regulation. (See Illustration 3, *infra*.) The Board of Directors of the FDIC has been expanded to five members, three of whom are directly appointed by the President with Senate advice and consent.¹⁴⁶ The remaining two members serve by virtue of their offices, the Comptroller of the Currency and the Director of the newly created Office of Thrift Supervision (DOTS).¹⁴⁷

The FDIC has been given responsibility for insurance of deposits of savings associations.¹⁴⁸ It will now administer a Bank Insurance Fund (BIF), formerly the Permanent Insurance Fund with respect to deposits of insured banks,¹⁴⁹ and a Savings Association Insurance Fund (SAIF), replacing the functions of the Federal Savings and Loan Insurance Corporation (FSLIC).¹⁵⁰ In addition, to wrap up the affairs of the FSLIC, an FSLIC Resolution Fund has been established, to be managed and separately maintained by the FDIC, consisting of assets and liabilities transferred from the

142. See, e.g., *supra* notes 12–13 and accompanying text.

143. FIRREA, *supra* note 1, §§ 201–226 (codified at 12 U.S.C. §§ 1811–1833).

144. For purposes of the FDIA, the term "depository institution" is defined to mean any "bank or savings association." FIRREA, *supra* note 1, § 204(c) (codified at 12 U.S.C. § 1813(c)(1)). On the general meaning of the term, see *supra* note 1. On the new generic term "savings association," see *supra* note 2.

145. FIRREA, *supra* note 1, § 201(a)(1) (codified at scattered sections of 12 U.S.C.). See also FIRREA, *supra* note 1, § 207 (codified at 12 U.S.C. § 1816) (factors to be considered in insurance applications; reference to "depository institution" rather than "bank"); FIRREA, *supra* note 1, § 209 (codified at 12 U.S.C. § 1819) (corporate powers of FDIC; same), FIRREA, *supra* note 1, § 216(1) (codified at 12 U.S.C. § 1822) (FDIC as receiver; same).

146. FIRREA, *supra* note 1, § 203(a) (codified at 12 U.S.C. § 1812(a)(1)(C)).

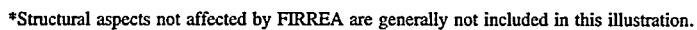
147. FIRREA, *supra* note 1, § 203(a) (codified at 12 U.S.C. § 1812(a)(1)(A)–(B)). On the DOTS, see *infra* notes 158–80 and accompanying text.

148. FIRREA, *supra* note 1, § 205(1) (codified at 12 U.S.C. § 1814(a)). See FIRREA, *supra* note 1, § 402(c) (procedure for differences in deposit insurance coverage between FDIC and abolished FSLIC). On the meaning of the term "savings association," see *supra* note 2. The procedures for termination of FDIC deposit insurance have also been extensively revised. See *id.* at § 926 (codified at 12 U.S.C. § 1818(a)).

149. FIRREA, *supra* note 1, § 211(3) (codified at 12 U.S.C. § 1821(a)(4)–(5)). On the investment of funds held in the BIF, see FIRREA, *supra* note 1, § 217(1) (codified at 12 U.S.C. § 1823(a)).

150. FIRREA, *supra* note 1, § 211(3) (codified at 12 U.S.C. § 1821(a)(4), (6)). On the investment of funds held in the SAIF, see FIRREA, *supra* note 1, § 217(1) (codified at 12 U.S.C. § 1823 (a)).

Regulatory Structural Changes Under the Financial Institutions Reform, Recovery, and Enforcement Act*



FSLIC.¹⁵¹ The FSLIC Resolution Fund is to be dissolved upon the satisfaction of all debts and liabilities and the sale of all assets.¹⁵²

The FDIC's powers as conservator or receiver have also been expanded and include appointment as receiver for any insured depository institution.¹⁵³ Likewise, provisions concerning the use of FDIC funds with respect to insured banks which are closed or are in danger of closing have been correspondingly amended to cover the authority of the FDIC to respond to the problem of insured depository institutions in default.¹⁵⁴

Certainly the most dramatic indications of structural realignment will be seen in the immediate abolition of the FSLIC¹⁵⁵ and, effective sixty days after the enactment of FIRREA, the abolition of the FHLBB and the position of Chairman of the FHLBB.¹⁵⁶ In addition, the Home Owners' Loan Act (HOLA) has been completely revised by FIRREA.¹⁵⁷ An Office of Thrift Supervision has been established within the Treasury Department,¹⁵⁸ and the DOTS¹⁵⁹ effectively replaces the FHLBB and the Chairman of the FHLBB,¹⁶⁰ except to the extent that any powers of the FHLBB or the Chairman have been transferred to other agencies.¹⁶¹

The DOTS is to be appointed by the President, with the advice and consent of the Senate, for a term of five years.¹⁶² The DOTS must be a U.S. citizen.¹⁶³ Despite the virtual collapse of the thrift industry during his tenure, the then current Chairman of the FHLBB has been designated by FIRREA to serve as the DOTS, without renewed advice and consent of the Senate, through the remainder of the period when he would have served as Chairman of the FHLBB.¹⁶⁴

The DOTS is now included in the FDIA definition as the "appropriate Federal banking agency" with respect to any savings association¹⁶⁵ or any SLHC.¹⁶⁶ The DOTS has the authority to charter federal savings associations¹⁶⁷ and is responsible for the examination, safe and sound operation and regulation of such entities.¹⁶⁸ As

151. FIRREA, *supra* note 1, § 215 (codified at 12 U.S.C. § 1821a).

152. FIRREA, *supra* note 1, § 215 (codified at 12 U.S.C. § 1821a(f)).

153. *See id.* FIRREA, *supra* note 1, § 212 (codified at 12 U.S.C. § 1821 (c)-(f)) (appointment of FDIC as conservator or receiver), FIRREA, *supra* note 1, § 216 (codified at 12 U.S.C. § 1822) (FDIC as receiver).

154. *See* FIRREA, *supra* note 1, § 217(3)-(8) (codified at 12 U.S.C. § 1823(c)-(f), (h),(i), (k)).

155. FIRREA, *supra* note 1, § 401(a)(1). *But see id.* §§ 401(b) (disposition and winding up of affairs of the FSLIC and FHLBB), (c) (transitional authority and status of FHLBB Chairman), (d) (status of employees), (e) (continuation of services), (f) (savings provisions relating to FSLIC), (h)-(i) (continuation of orders, resolutions, determinations, and regulations of FSLIC and FHLBB), 402(a),(b) (continuation and coordination of certain regulations).

156. *Id.* § 401(a)(2).

157. *See id.* § 301 (amending the Home Owners' Loan Act, 12 U.S.C. §§ 1461-70 (1988) [hereinafter HOLA]. Subsequent references to sections within HOLA refer to the sections designated within FIRREA, *supra* note 1, § 301.

158. HOLA, *supra* note 157, § 3(a).

159. *See id.* § 3(b) (establishment of position of the DOTS).

160. *Id.* § 3(e)(1).

161. *Id.* § 3(e)(2).

162. *Id.* § 3(c)(1)-(2).

163. *Id.* § 3(c)(1).

164. *Id.* § 3(c)(5). This carryover official, M. Danny Wall, has since resigned. *See* Nash, *Top Savings Regulator Resigns and Strikes Back at His Critics*, N.Y. Times, Dec. 5, 1989, at A1, col. 1.

165. On the meaning of the term "savings association," *see supra* note 2.

166. FIRREA, *supra* note 1, § 204(f)(4) (codified at 12 U.S.C. § 1813(q)(4)).

167. HOLA, *supra* note 157, § 5(a).

168. *Id.* § 4(a)(1). On examinations, *see id.* § 5(d)(1)(B). As to safety and soundness supervision, the amended

to the chartering and permitted activities of federally chartered savings associations under section 5 of the HOLA, the DOTS has statutory authority to enforce that section, as well as the general enforcement provisions of section 8 of the FDIA,¹⁶⁹ and regulations promulgated thereunder.¹⁷⁰ The DOTS is authorized to issue regulations appropriate to carry out statutory responsibilities.¹⁷¹ The DOTS is also charged with the responsibility of prescribing by regulation uniform accounting and disclosure standards for savings associations.¹⁷²

The DOTS is also given exclusive power and jurisdiction to appoint a conservator or receiver for a federally chartered savings association,¹⁷³ and the DOTS has authority to promulgate regulations for the reorganization, consolidation, liquidation, and dissolution of savings associations, for mergers between insured savings associations, and for savings associations in conservatorship or receivership and the conduct thereof.¹⁷⁴ In addition, under statutorily specified grounds, the DOTS has the power and jurisdiction to appoint a conservator or receiver for an insured state-chartered savings association.¹⁷⁵

Establishment or acquisition of a subsidiary by a savings association, or the initiation of a new activity through an existing subsidiary requires thirty-day prior notification to the FDIC and to the DOTS.¹⁷⁶ Conduct of the activities of such subsidiaries is subject to regulations and orders of the DOTS.¹⁷⁷ Both the FDIC and the DOTS have authority under the general enforcement provisions of the FDIA¹⁷⁸ with respect to subsidiaries of savings associations,¹⁷⁹ and the DOTS has also been given divestiture power with respect to such subsidiaries.¹⁸⁰

In addition, the FDIC has authority, by regulation or order, to determine that any specific activity poses a serious threat to the SAIF and to order that no SAIF member

HOLA specifies that "[a]ll regulations and policies of the [DOTS] governing the safe and sound operation of savings associations, . . . shall be no less stringent than those established by the Comptroller of the Currency for national banks." *Id.* § 4(c).

169. 12 U.S.C. § 1818 (1988).

170. HOLA, *supra* note 157, § 5(d)(1)(A).

171. *Id.* § 4(a)(2).

172. *Id.* § 4(b)(1).

173. *Id.* § 5(d)(2)(E). On the grounds for appointment of a conservator or receiver for a federally chartered savings association, see *id.* §§ 5(d)(2)(A) (mandatory grounds), 5(d)(2)(B) (additional grounds; consent of the association, or removal from membership in a federal home loan bank or from status as insured institution).

174. *Id.* § 5(d)(3)(A). In cases where the FDIC or the RTC is the conservator or receiver, DOTS regulations must be consistent with regulations prescribed by the FDIC. *Id.* § 5(d)(3)(B). On the RTC, see *infra* notes 190-92 and accompanying text.

175. HOLA, *supra* note 157, § 5(d)(2)(C). Written approval of the state official with jurisdiction over the insured association, indicating that one or more of the statutory grounds exists, is generally necessary for the exercise of this authority by the DOTS. *Id.* § 5(d)(2)(D)(i). *But cf. id.* § 5(d)(2)(D)(ii) (authority of DOTS to proceed with appointment under certain circumstances).

176. FIRREA, *supra* note 1, § 221(4) (codified at 12 U.S.C. § 1828(m)(1)(A)). This provision does not apply to federal savings banks chartered prior to October 15, 1982, as a state-chartered savings bank or to savings associations that acquired their principal assets from institutions chartered prior to October 15, 1982, as a state-chartered savings bank. FIRREA, *supra* note 1, § 221(4) (codified at 12 U.S.C. § 1828(m)(5)(A),(B)).

177. FIRREA, *supra* note 1, § 221(4) (codified at 12 U.S.C. § 1828(m)(1)(B)).

178. See 12 U.S.C. § 1818 (1988).

179. FIRREA, *supra* note 1, § 221(4) (codified at 12 U.S.C. § 1828(m)(2)(A)).

180. FIRREA, *supra* note 1, § 221(4) (codified at 12 U.S.C. § 1828(m)(2)(B)).

engage directly in any such activity.¹⁸¹ This provision does not limit the authority of the DOTS to issue safety and soundness regulations generally, or to enforce compliance with other laws as applicable.¹⁸²

With respect to permissible activities of savings associations, newly subjected to general limitations under the FDIA,¹⁸³ equity investments, whether by a state or federally chartered savings association,¹⁸⁴ are limited to those investments permissible for federal savings associations.¹⁸⁵ The FDIC has the responsibility to require divestiture of impermissible equity investments "as quickly as can be prudently done, and in any event not later than July 1, 1994."¹⁸⁶ Similarly, savings associations are generally prohibited from acquiring or retaining, directly or through a subsidiary, any corporate debt security not of investment grade.¹⁸⁷

The Federal Home Loan Bank System has also been transformed by FIRREA. With the abolition of the FHLBB, there has now been established a Federal Housing Finance Board (FHFB).¹⁸⁸ The FHFB is intended, *inter alia*, to supervise the federal home loan banks (FHLBs) in carrying out their housing finance mission.¹⁸⁹

Three new regulatory entities have been created to "resolve" all cases involving FSLIC-insured institutions placed in conservatorship or receivership between January 1, 1989, and the date of enactment of FIRREA, or to be so placed within the three-year period following that enactment. The Resolution Trust Corporation (RTC) has been established¹⁹⁰ for the express purpose, *inter alia*, of managing and resolving such cases.¹⁹¹ The RTC is under the exclusive management of the FDIC.¹⁹²

181. FIRREA, *supra* note 1, § 221(4) (codified at 12 U.S.C. 1828(m)(3)(A)). See also FIRREA, *supra* note 1, § 221(4) (codified at 12 U.S.C. § 1828(m)(3)(C)) (additional authority of FDIC; serious risks to SAIF and BIF).

182. See FIRREA, *supra* note 1, § 221(4) (codified at 12 U.S.C. 1828(m)(3)(B)).

183. See FIRREA, *supra* note 1, § 222 (codified at 12 U.S.C. § 1831e(a),(b)). These provisions do not require divestiture by a savings association of any assets acquired prior to the enactment of the FIRREA. FIRREA, *supra* note 1, § 222 (codified at 12 U.S.C. § 1831e(g)(2)).

184. See FIRREA, *supra* note 1, § 222 (codified at 12 U.S.C. § 1831e(c)(1)).

185. *Id.* There is an exception from this limitation provided for service corporations. See FIRREA, *supra* note 1, § 222 (codified at 12 U.S.C. § 1831e(c)(2)).

186. FIRREA, *supra* note 1, § 222 (codified at 12 U.S.C. § 1831e(c)(3)(A)). For the treatment of noncompliance during the divestment process, see FIRREA, *supra* note 1, § 222 (codified at 12 U.S.C. § 1831e(c)(3)(B)).

187. FIRREA, *supra* note 1, § 222 (codified at 12 U.S.C. § 1831e(d)(1)). For these purposes, the term "corporate debt security not of investment grade" does not include obligations issued or guaranteed by a corporation that may be held by a federal savings association under the newly amended HOLA, *supra* note 157, § 5(c)(1)(D)-(F). FIRREA, *supra* note 1, § 222 (codified at 12 U.S.C. § 1831e(d)(4)(C)). The term "investment grade" is defined for these purposes to mean a security that, "when acquired by the savings association or subsidiary, was rated in one of the 4 highest rating categories by at least one nationally recognized statistical rating organization." FIRREA, *supra* note 1, § 222 (codified at 12 U.S.C. § 1831e(d)(4)(A)). For an exception from this prohibition for debt securities held by a "qualified affiliate" of a savings association, see FIRREA, *supra* note 1, § 222 (codified at 12 U.S.C. § 1831e(d)(2)). On the definition of "qualified affiliate" for these purposes, see FIRREA, *supra* note 1, § 222 (codified at 12 U.S.C. § 1831e(d)(4)(B)). Under certain circumstances, with the approval of the DOTS, ineligible corporate debt securities may be transferred in exchange for "qualified notes." See FIRREA, *supra* note 1, § 222 (codified at 12 U.S.C. § 1831e(e)).

188. FIRREA, *supra* note 1, § 702(a) (codified at 12 U.S.C. § 1422a(a)(1)).

189. See FIRREA, *supra* note 1, § 702(a) (codified at 12 U.S.C. §§ 1422a(a)(3)(B), 1422b(a)(1)) (powers and duties of FHFB). See also FIRREA, *supra* note 1, § 709 (codified at 12 U.S.C. § 1431) (powers and duties of FHLBs). On eligibility of insured depository institutions for membership in the FHLBs, see FIRREA, *supra* note 1, § 704(a) (codified at 12 U.S.C. § 1424(a)).

190. FIRREA, *supra* note 1, § 501(a) (codified at 12 U.S.C. § 1421a(b)(1)).

191. FIRREA, *supra* note 1, § 501 (codified at 12 U.S.C. § 1421a(b)(3)).

192. FIRREA, *supra* note 1, § 501 (codified at 12 U.S.C. § 1421a(b)(1)(C)).

In addition, FIRREA has established the Oversight Board¹⁹³ to oversee and be accountable for the RTC.¹⁹⁴ The Oversight Board consists of five members:¹⁹⁵ the Secretary of the Treasury, who serves as chairperson;¹⁹⁶ the Chairman of the Board of Governors of the Federal Reserve System; the Secretary of Housing and Urban Development; and two independent members appointed by the President with the advice and consent of the Senate.¹⁹⁷ The term of the first three members is coterminous with the period of his or her responsibilities specified in sections 501 and 511¹⁹⁸ of FIRREA.¹⁹⁹ The two independent members have three-year terms.²⁰⁰ While the FDIC has management responsibility for the RTC, the Oversight Board has the responsibility, *inter alia*, to develop and establish overall strategies, policies, and goals of the RTC's activities in consultation with the RTC,²⁰¹ to approve, prior to their implementation, periodic financing requests developed by the RTC,²⁰² to authorize the use of proceeds from funds provided by the Treasury Department and from any financing by the newly created Resolution Funding Corporation (REFCO), and to oversee collection of funds by the REFCO.²⁰³

Finally, FIRREA has established the REFCO,²⁰⁴ as the mechanism for providing funds to the RTC. REFCO will issue nonvoting capital stock to the FHLBs²⁰⁵ as well as debt obligations,²⁰⁶ will purchase capital certificates issued by the RTC,²⁰⁷ and in addition will transfer statutorily specified amounts to the RTC.²⁰⁸

B. *Chartering Authority and Related Powers*

FDIC authority is confirmed by FIRREA to organize any "new bank," *i.e.*, a new national bank in the same community as a bank in default to assume the insured deposits of the latter and otherwise to perform, temporarily, functions specified in FIRREA.²⁰⁹ New banks require authorization of the Comptroller to transact any other business.²¹⁰ In addition, when one or more insured banks are in default, or the FDIC anticipates that they may come into default, the FDIC has the authority to organize,

193. FIRREA, *supra* note 1, § 501 (codified at 12 U.S.C. § 1421a(a)(1)).

194. FIRREA, *supra* note 1, § 501 (codified at 12 U.S.C. § 1421a(a)(2)).

195. FIRREA, *supra* note 1, § 501 (codified at 12 U.S.C. § 1421a(a)(3)(A)).

196. FIRREA, *supra* note 1, § 501 (codified at 12 U.S.C. § 1421a(a)(3)(C)).

197. FIRREA, *supra* note 1, § 501 (codified at 12 U.S.C. § 1421a(a)(3)(A)(iv)).

198. FIRREA, *supra* note 1, § 511 (codified at 12 U.S.C. § 1421b).

199. FIRREA, *supra* note 1, § 501 (codified at 12 U.S.C. § 1421a(a)(3)(D)).

200. *Id.*

201. FIRREA, *supra* note 1, § 501 (codified at 12 U.S.C. § 1421a(a)(6)(A)).

202. FIRREA, *supra* note 1, § 501 (codified at 12 U.S.C. § 1421a(a)(6)(B)).

203. FIRREA, *supra* note 1, § 501 (codified at 12 U.S.C. § 1421a(a)(6)(G)).

204. FIRREA, *supra* note 1, § 511(a) (codified at 12 U.S.C. § 1421b(b)).

205. *See* FIRREA, *supra* note 1, § 511(a) (codified at 12 U.S.C. § 1421b(d)(1)). *See also* FIRREA, *supra* note 1, § 511(a) (codified at 12 U.S.C. § 1421b(e)) (capitalization of REFCO).

206. FIRREA, *supra* note 1, § 511(a) (codified at 12 U.S.C. § 1421b(d)(3)). *See also* FIRREA, *supra* note 1, § 511(a) (codified at 12 U.S.C. § 1421b(f)) (obligations of the REFCO).

207. FIRREA, *supra* note 1, § 511(a) (codified at 12 U.S.C. § 1421b(d)(2)).

208. *See* FIRREA, *supra* note 1, § 511(a) (codified at 12 U.S.C. § 1421b(d)(2), (e)(8)).

209. FIRREA, *supra* note 1, § 213 (codified at 12 U.S.C. § 1821(m)).

210. FIRREA, *supra* note 1, § 213 (codified at 12 U.S.C. § 1821(m)(9)).

and the Comptroller to charter, "bridge banks" to assume deposits of such insured banks.²¹¹

Federal chartering of savings associations²¹² is within the authority of the DOTS, under such regulations as the DOTS may provide, "giving primary consideration [to] the best practices of thrift institutions in the United States."²¹³ A charter may be granted only upon the satisfaction of the following statutory conditions:

(i) that the persons to whom the charter is to be issued are of good character and responsibility;

(ii) that, in the judgment of the DOTS, necessity exists for such an institution in the community to be served;

(iii) that there is a reasonable probability of the association's usefulness and success; and,

(iv) that the institution can be established without undue injury to properly conducted existing local thrift and home financing institutions.²¹⁴

Upon receiving its charter, a federal savings association²¹⁵ automatically becomes a member of the FHLB in the district in which the association is located or, if convenience requires and the DOTS approves, in an adjoining district.²¹⁶

A federal savings association may act as a trustee, executor, administrator, guardian, or in any other fiduciary capacity in which a state bank, trust company, or other corporation that competes with federal savings associations is permitted to act under the laws of the state in which the federal savings association is located, upon the issuance of a special permit by the DOTS.²¹⁷ Subject to regulations to be promulgated by the DOTS, service corporations²¹⁸ may invest in federally or state-chartered corporations located in the state in which the home office of the federal savings association is located and which are engaged in trust activities.²¹⁹ In reviewing trust applications, the DOTS may consider the following statutory factors:

(i) the amount of capital of the applicant federal savings association;²²⁰

(ii) the sufficiency of the capital under the circumstances;

(iii) the needs of the community to be served; and

(iv) other facts and circumstances that the DOTS deems to be proper.²²¹

211. FIRREA, *supra* note 1, § 214 (codified at 12 U.S.C. § 1821(n)). To the extent that a bridge bank assumes any insured deposits, all insured deposits of the insured bank must be assumed by the bridge bank or another insured depository institution. FIRREA, *supra* note 1, § 214 (codified at 12 U.S.C. § 1821(n)(1)(B)(i)).

212. On the definition of "savings association" for these purposes, see HOLA, *supra* note 157, § 2(4), referring to 12 U.S.C. § 1813. See also *supra* note 2 (definition under the FDIA, 12 U.S.C. § 1813(b) (1989)).

213. HOLA, *supra* note 157, § 5(a).

214. *Id.* § 5(e)(1)-(4).

215. On the definition of "federal savings association," see *id.* § 2(5). See also *supra* note 2 (definition under the FDIA, 12 U.S.C. § 1813(b) (1989)).

216. HOLA, *supra* note 157, § 5(f). Newly chartered federal savings associations must qualify for membership in same manner under the Home Loan Bank Act as other members. *Id.* On membership, see FIRREA, *supra* note 1, § 704(a) (codified at 12 U.S.C. § 1424(a)).

217. HOLA, *supra* note 157, § 5(n)(1).

218. On the limitations on investments by federal savings associations in service corporations, see *id.* § 5(c)(4)(B).

219. *Id.* § 5(n)(1).

220. A permit may not be issued if the applicant has capital in an amount less than required by state law of state-chartered banks, trust companies, and corporations exercising such trust powers. *Id.* § 5(n)(8).

221. *Id.* § 5(n)(8)(A)-(D). On surrender or revocation of trust powers, see *id.* § 5(n)(9), (10), respectively.

C. *Supervision and Enforcement with Respect to Management of Depository Institutions*

FIRREA has undertaken a significant expansion and enhancement of regulatory enforcement and criminal liability provisions with respect to depository institutions and their management.²²² Among other things, it gives express authority to the FDIC to take enforcement action against savings associations, in the absence of action by the DOTS in accordance with FDIC recommendations.²²³

The FIRREA provisions expanding the enforcement authority of the federal regulators will result in significant changes in the substance and procedures of the process of regulatory enforcement.²²⁴ However, in light of the dramatic expansion and enhancement of enforcement powers granted to the regulators it may be significant that they are now required by FIRREA to adopt certain reforms in the process,²²⁵ first advocated by this author,²²⁶ that hold some promise for adjusting the balance between regulator and regulated in the enforcement context.²²⁷

D. *Supervision of Changes in Control*

FIRREA has amended the Change in Bank Control Act (CBCA)²²⁸ to indicate expressly that, under certain specified circumstances, the resignation, termination of employment or participation, divestiture of control, or separation of or by an "institution-affiliated party"²²⁹ does not affect the jurisdiction and authority of the appropriate federal banking agency to proceed against such a party under the CBCA.²³⁰ Civil money penalties for violations of the CBCA have been expanded and increased.²³¹

E. *Capital Standards*

The amended HOLA directs the DOTS, consistent with the purposes of section 908 of the International Lending Supervision Act of 1983²³² and the capital requirements established thereunder by the federal banking regulators,²³³ to require all

222. For a detailed discussion of these developments, see *infra* notes 286–338 and accompanying text. See also Board of Governors, SR89-17 (F15), Aug. 17, 1989, reprinted in 3 Fed. Banking L. Rep. (CCH) ¶ 35,340 (Sept. 8, 1989) (memorandum discussing enforcement and related provisions of FIRREA).

223. FIRREA, *supra* note 1, § 912 (codified at 12 U.S.C. § 1818(t)).

224. See *infra* notes 286–343 and accompanying text (discussion of changes in the regulatory enforcement process resulting from the FIRREA provisions).

225. See *infra* notes 339–43 and accompanying text (discussion of FIRREA-mandated reforms in regulatory enforcement process).

226. See Malloy, *supra* note 34, at 791–97.

227. See *infra* notes 344–84 and accompanying text (concluding observations concerning FIRREA-mandated reforms).

228. 12 U.S.C. § 1817(j) (1988). On the CBCA and its regulatory implementation, see 1 M. MALLOY, *supra* note 1, at 266–84.

229. On the meaning of the term of art "institution-affiliated party," introduced by FIRREA, see *infra* notes 286–90 and accompanying text.

230. FIRREA, *supra* note 1, § 905(c) (codified at 12 U.S.C. § 1817(j)(15)).

231. FIRREA, *supra* note 1, § 907(d) (codified at 12 U.S.C. § 1817(j)).

232. 12 U.S.C. § 3907 (1988).

233. On capital standards applicable to banks, see 1 M. MALLOY, *supra* note 1, at 452–58.

savings associations to achieve and maintain adequate capital by establishing minimum capital levels and by using other methods as determined to be appropriate by the DOTS.²³⁴ Consistent with provisions concerning capital standards,²³⁵ the DOTS may establish minimum capital levels on a case-by-case basis, by amount, or at a capital-to-assets ratio.²³⁶ Failure by a savings association to maintain capital at or above the minimum level may be treated by the DOTS as an unsafe or unsound practice.²³⁷ The DOTS is also authorized to issue capital directives,²³⁸ and to enforce directives and capital plans approved thereunder in the same manner as outstanding, final orders issued under the general enforcement provisions of the FDIA.²³⁹ Progress in complying with any capital plan may be taken into account by the DOTS in considering any other proposal by a savings association or affiliate that would have the effect of diverting earnings, diminishing capital, or otherwise impeding progress with respect to the capital plan.²⁴⁰ Such a proposal may be disapproved if the DOTS determines that it would adversely affect the ability of the association to comply with a capital plan.²⁴¹

The amended HOLA also requires the DOTS to prescribe by regulation and maintain uniformly applicable capital standards for savings associations.²⁴² The prescribed capital standards must include: (i) a "leverage limit" of core capital²⁴³ in an amount not less than three percent of a savings association's total assets;²⁴⁴ (ii) a "tangible capital"²⁴⁵ requirement in an amount not less than 1.5 percent of a savings association's total assets;²⁴⁶ and (iii) a risk-based capital requirement.²⁴⁷ The prescribed standards must be no less stringent than those applicable to national banks.²⁴⁸ The DOTS final regulations in this regard must be promulgated not later than 90 days, and effective not later than 120 days, after enactment of FIRREA.²⁴⁹ In general, investments in and extensions of credit to a subsidiary engaged in activities not permissible for a national bank are to be deducted from the capital of a savings

234. HOLA, *supra* note 157, § 5(s)(1)(A),(B).

235. *See id.* § 5(t). *See also infra* notes 242–51 and accompanying text.

236. HOLA, *supra* note 157, § 5(s)(2).

237. *Id.* § 5(s)(3).

238. *Id.* § 5(s)(4)(A).

239. *Id.* § 5(s)(4)(B). *See* 12 U.S.C. § 1818 (1988) (FDIA enforcement provision).

240. HOLA, *supra* note 157, § 5(s)(5)(A).

241. *Id.* § 5(s)(5)(B).

242. *Id.* § 5(t)(1)(A).

243. On the definition of "core capital" for these purposes, *see id.* § 5(t)(9)(A).

244. *Id.* § 5(t)(1)(A)(i), (2)(A).

245. The term "tangible capital" is defined for these purposes to mean core capital less any intangible assets. *Id.* § 5(t)(9)(C). *But see id.* § 5(t)(3) (transition rule permitting inclusion of "qualifying supervisory goodwill" in calculation of core capital of certain eligible savings associations through December 31, 1994). *See also id.* § 5(t)(3)(B) (meaning of "eligible savings association"), (9)(B) (definition of "qualifying supervisory goodwill").

246. *Id.* § 5(t)(1)(A)(ii), (2)(B).

247. *Id.* § 5(t)(1)(A)(iii), (2)(C). A savings association is not in compliance with the statutory capital standards unless it complies with all three prescribed standards. *Id.* § 5(t)(1)(B). On the legal consequences of a failure to comply with the capital standards, *see id.* § 5(t)(6)–(7).

248. *Id.* § 5(t)(1)(C).

249. *Id.* § 5(t)(1)(D).

association.²⁵⁰ In calculating compliance with applicable capital adequacy standards, unidentifiable intangible assets generally may not be included if acquired after April 12, 1989.²⁵¹

Given the likely difficulty that savings associations will encounter in complying with anything close to the capital adequacy standards dictated under these provisions of FIRREA,²⁵² we shall no doubt see the issue of capital standards revisited, as a new "crisis," upon the promulgation and application of the FIRREA-mandated regulations. Yet to criticize FIRREA as imposing too stringent a standard is to suggest that it is intolerably impolitic to require savings associations to meet standards that are unremarkable among other depository institutions.

F. Securities Disclosure

FIRREA has made conforming amendments to section 12(i) of the 1934 Act²⁵³ so that the section now refers to "banks and savings associations"²⁵⁴ and deletes the reference to "institutions the accounts of which are insured by the Federal Savings and Loan Insurance Corporation."²⁵⁵ It also strikes the language identifying the FSLIC as a delegated regulator under the section, and instead identifies the Office of Thrift Supervision as the delegated regulator "with respect to savings associations the accounts of which are insured by the Federal Deposit Insurance Corporation."²⁵⁶

G. Holding Company Regulation

FIRREA draws the provisions governing the regulation of SLHCs into the HOLA itself.²⁵⁷ For these purposes, an SLHC is defined to mean any company²⁵⁸ that directly or indirectly controls a savings association²⁵⁹ or that controls any other company which is an SLHC.²⁶⁰

FIRREA also amends section 4 of the BHCA²⁶¹ expressly to facilitate thrift acquisitions by BHCs,²⁶² not limited to acquisitions of failing thrifts. In addition,

250. *Id.* § 5(t)(5)(A). But see *id.* § 5(t)(5)(B),(C) (exceptions from separate capitalization of subsidiaries), (5)(D) (transition rule). See also *id.* § 5(t)(8) (temporary authority of DOTS to make exceptions for eligible savings associations).

251. FIRREA, *supra* note 1, § 221(4) (codified at 12 U.S.C. § 1828(n)). However, such unidentifiable intangibles may be included to the extent permitted under the capital standards provisions of newly amended HOLA, *supra* note 157, § 5(t). FIRREA, *supra* note 1, § 221(4) (codified at 12 U.S.C. § 1828(n)).

252. See Thomas, *S&L Law's Language on Capital Rules Has Left Officials Split on What It Says*, Wall St. J., Sept. 7, 1989, at A3, col. 2 (depending upon interpretation of FIRREA capital standard provisions, 900 to 1,400 savings associations would fail to comply in their present condition). Cf. Rosenstein, *supra* note 132, at 2 (discussing difficulty for savings associations in meeting a 6% capital standard).

253. 15 U.S.C. § 78(i) (1982). On the application of the 1934 Act to securities issued by banks and thrift institutions (now known generically as savings associations), see 1 M. MALLOY, *supra* note 1, at 491-93.

254. FIRREA, *supra* note 1, § 744(u)(2)(A)(i) (codified at 12 U.S.C. § 781(i)).

255. FIRREA, *supra* note 1, § 744(u)(2)(A)(ii).

256. *Id.* § 744(u)(2)(A)(iii) (codified at 12 U.S.C. § 781(i)(4)).

257. See generally FIRREA, *supra* note 1, § 301 (HOLA, *supra* note 157, § 10, regulation of holding companies). On the regulation of SLHCs, see generally 2 M. MALLOY, *supra* note 1, at 755-86.

258. On the definition of "company" for these purposes, see HOLA, *supra* note 157, § 10(a)(1)(C).

259. On the meaning of the term "savings association," see *id.* § 10(a)(1)(A). See also *supra* note 2.

260. HOLA, *supra* note 157, § 10(a)(1)(D).

261. 12 U.S.C. § 1843 (1989).

262. FIRREA, *supra* note 1, § 601(a) (codified at 12 U.S.C. § 1843(i)(1)). For a discussion of the previous policy,

FIRREA indicates that no special restrictions on transactions between such acquired institutions and their holding company affiliates are to be imposed by the Fed beyond those restrictions generally applicable.²⁶³ The Fed is required to remove any such restrictions on pre-FIRREA thrift acquisitions.²⁶⁴

FIRREA also makes technical amendments to the BHCA, conforming the Act's definitional and approval provisions to the generic use in FIRREA of the terminology "savings association"²⁶⁵ and "depository institution."²⁶⁶ Similarly, it makes substantive and technical amendments to BHCA provisions with respect to passive investments by companies controlling certain nonbank banks,²⁶⁷ and permits the purchase of minority interests in undercapitalized savings associations by BHCs.²⁶⁸

H. *Mergers and Acquisitions*

FIRREA has also amended the Bank Merger Act (BMA),²⁶⁹ in light of the significant changes in the federal regulatory structure. The FDIC is identified as the "responsible agency" for approval with respect to covered mergers and acquisitions "if the acquiring, assuming, or resulting bank is to be a State nonmember insured bank (except a District [of Columbia] bank or a savings bank supervised by the [DOTS])."²⁷⁰ In addition, the newly created DOTS is now identified as the "responsible agency" for approval with respect to covered mergers and acquisitions "if the acquiring, assuming, or resulting institution is to be a savings association."²⁷¹

I. *Conversions*

Conversions of any savings association that is or is eligible to become a member of an FHLB into a federal savings association, and any accompanying conversion from mutual to stock or stock to mutual form,²⁷² will be subject to regulations prescribed by the DOTS.²⁷³ Further, any federal savings association may change its

generally limiting thrift acquisitions by BHCs to troubled or failing thrift institutions, see 2 M. MALLOY, *supra* note 1, at 727-28, n.9.

263. FIRREA, *supra* note 1, § 601(a) (codified at 12 U.S.C. § 1843(i)(2)).

264. FIRREA, *supra* note 1, § 601(b).

265. See *id.* § 602(a) (codified at 12 U.S.C. § 1841(j)(1)-(2)) (BHCA definition of "savings association" and "insured institution").

266. See FIRREA, *supra* note 1, § 602(b) (codified at 12 U.S.C. § 1842(e)) (substituting "insured depository institution as defined in section 3" for "insured bank as defined in section 3(h)").

267. See FIRREA, *supra* note 1, § 603 (codified at 12 U.S.C. § 1843(f)(2)(A)(ii), (10)-(11)). On the meaning of "nonbank bank" and its regulation under the BHCA, see 2 M. MALLOY, *supra* note 1, at 725-55.

268. See FIRREA, *supra* note 1, § 604(b) (codified at 12 U.S.C. § 1843(f)(2)(A), (12)-(13)). The FIRREA also amends § 205 of the Depository Institutions Management Interlocks Act to exempt certain specified interlocks by a single management official in connection with the purchase of a minority interest in an undercapitalized savings association by a savings and loan holding company. FIRREA, *supra* note 1, § 604(a) (codified at 12 U.S.C. § 3204(9)).

269. 12 U.S.C. § 1828(c) (1989). For a discussion of the BMA and its regulatory implementation, see 2 M. MALLOY, *supra* note 1, at 799-819.

270. FIRREA, *supra* note 1, § 221(2)(A) (codified at 12 U.S.C. § 1828(c)(2)(C)).

271. FIRREA, *supra* note 1, § 221(2)(A) (codified at 12 U.S.C. § 1828(c)(2)(D)).

272. Conversion of any savings association from mutual to stock or stock to mutual form is prohibited except in accordance with regulations promulgated by the DOTS. HOLA, *supra* note 157, § 5(i)(2)(A).

273. *Id.* § 5(i)(1).

designation from a federal savings association to a federal savings bank, or vice versa.²⁷⁴

A federal savings association may convert into a state savings association or savings bank, organized under the laws of the state in which the principal office of the association is located, if the following conditions are met:

(i) the state permits conversion of state savings associations or savings banks into federal savings associations;

(ii) the conversion is determined upon the requisite vote, in person or by proxy, of members or stockholders of the association in accordance with state law, but in no event by less than fifty-one percent of the votes cast at the members' or stockholders' meeting, and upon compliance with any other requirements reciprocally equivalent to the requirements of state law for conversion of a state-chartered institution into a federal savings association;

(iii) requisite notice of the meeting is given;²⁷⁵

(iv) if the converted institution is mutual in form, upon dissolution after conversion the members or shareholders will share on a mutual basis in the assets of the association in exact proportion to their relative share or account credits;

(v) if the converted institution is stock in form, upon dissolution after conversion the stockholders will share on an equitable basis in the assets of the association; and

(vi) the conversion shall be effective on the date that all provisions of the HOLA have been fully complied with, and upon the issuance of the new charter by the state in which the association is located.²⁷⁶

Conversion of a BIF-member state savings bank into a federal savings bank is permitted if authorized, subject to the provisions of the amended HOLA²⁷⁷ and pursuant to regulations promulgated by the DOTS.²⁷⁸ The DOTS is authorized to provide for the organization, incorporation, operation, examination, and regulation of such converted savings banks.²⁷⁹ Such a converted savings bank continues to be a BIF member until such time as it changes its status to an SAIF member.²⁸⁰

Consistent with the purposes of the HOLA, the DOTS has also been authorized, notwithstanding any other provision of law: (i) to approve or (in the case of a federal savings association) to require conversion of a mutual savings association or an FDIC-insured federal mutual savings bank into a federal stock savings association or federal stock savings bank; (ii) to charter a federal stock savings association or federal stock savings bank to acquire the assets of such a mutual institution; or (iii) to charter a federal stock savings association or federal stock savings bank to merge with such a mutual institution.²⁸¹ Such a conversion is authorized only if one of the following conditions is met:

274. *Id.* § 5(i)(2)(C).

275. For the notice requirements, see *id.* § 5(i)(3)(A)(iii).

276. *Id.* § 5(i)(3)(A)(i)-(vi).

277. See *id.* § 5(o)(2)(B)-(E).

278. *Id.* § 5(o)(1).

279. *Id.*

280. *Id.* § 5(o)(2)(A).

281. *Id.* § 5(p)(1).

(i) the DOTS determines that severe financial conditions exist that threaten the stability of the association to be converted and that the conversion is likely to improve the financial condition of the association;

(ii) the FDIC has contracted to provide assistance to the association under section 13 of the FDIA;²⁸² or

(iii) the conversion is intended to assist an institution in receivership.²⁸³

A federal savings bank chartered under these provisions would have the same authority and be subject to the same applicable restrictions if it had been chartered as a federal savings bank under any other provision of the HOLA.²⁸⁴ In addition, it could engage in any investment, activity, or operation that the acquired institution was engaged in, if the latter was a federal savings bank, or would have been authorized to engage in if the latter had converted to a federal charter.²⁸⁵

IV. ENHANCEMENT OF ADMINISTRATIVE ENFORCEMENT POWERS UNDER FIRREA

One of the clearest indications of the direction in which FIRREA takes federal depository institutions law with respect to the enhancement of enforcement powers is a simple definitional amendment. A new term of art is introduced into the FDIA with the enactment of the term "institution-affiliated party." An "institution-affiliated party" is defined as:

(1) any director, officer, employee, or controlling stockholder (other than a bank holding company) of, or agent for, an insured depository institution;

(2) any other person who has filed or is required to file a change-in-control notice^[286] with the appropriate Federal banking agency under [12 U.S.C. § 1817(j)];

(3) any shareholder (other than a bank holding company), consultant, joint venture partner, and any other person as determined by the appropriate Federal banking agency (by regulation or case-by-case) who participates in the conduct of the affairs of an insured depository institution; and

(4) any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in—

(A) any violation of any law or regulation;

(B) any breach of fiduciary duty; or

(C) any unsafe or unsound practice,^[287] which caused or is likely to cause more than a minimal financial loss to,^[288] or a significant adverse effect on, the insured depository institution.²⁸⁹

282. 12 U.S.C. § 1823 (1988).

283. HOLA, *supra* note 157, § 5(p)(2)(A)–(C).

284. *Id.* § 5(p)(3).

285. *Id.*

286. On persons required to file change-in-control notices, see 1 M. MALLOY, *supra* note 1, at 271, 276–77.

287. For a discussion of the meaning of the term "unsafe or unsound practice," see Malloy, *supra* note 34, at 769–74.

288. Without a doubt, much ink will be spilled on the subject of what constitutes "more than a minimal financial loss" to an institution. *Cf., e.g.,* Gulf Fed. Sav. & Loan Ass'n of Jefferson Parish v. Federal Home Loan Bank Bd., 651 F.2d 259, 264 n.4 (5th Cir. 1981), *cert. denied*, 458 U.S. 1121 (1982) (potential loss of \$80,000 on assets of \$75,000,000 not an abnormal risk of loss; no "unsafe or unsound practice" involved in S&L's practices). An analogy might be drawn for these purposes to the guiding concept of "materiality" as a basis for a fraud action in federal securities law. *See generally* Basic, Inc. v. Levinson, 485 U.S. 224 (1988) (discussing meaning of "materiality").

289. FIRREA, *supra* note 1, § 204(f)(6) (codified at 12 U.S.C. § 1813(u)).

A corresponding definitional provision has been added by FIRREA to the FCUA.²⁹⁰

Thus, the categories of individual persons subject to the general regulatory enforcement authority of the federal regulators have been expanded through the substitution of the generic concept of "institution-affiliated parties" for such specific concepts as director, officer, employee, agent, or "other person participating in the conduct of the affairs" of an institution.²⁹¹ The enforcement provisions of the FDIA are also expanded to cover not only "banks" but all "depository institutions."²⁹² The latter term includes "savings associations,"²⁹³ and the DOTS is the "appropriate Federal banking agency" charged with authority under the FDIA enforcement provisions with respect to these associations.²⁹⁴ In addition, the FDIA enforcement authority now applies to SLHCs and nonbanking subsidiaries of SLHCs, in the same manner as it applies to these associations.²⁹⁵ As these authorities parallel the statutory authority formerly exercised by the FHLBB and the FSLIC,²⁹⁶ presumably the case law interpreting the latter will remain pertinent in interpreting the authority now placed with the DOTS, except to the extent that FIRREA has substantively altered that authority.

Had nothing else changed in the enforcement powers granted the regulators, FIRREA would still have represented an important development in regulatory enforcement. The reach of these enforcement powers would extend beyond the relatively narrow categories of director, officer, employee, agent, and management participant to reach such peripheral participants as persons subject to the change-in-control notice requirements²⁹⁷ and independent contractors like attorneys, apprais-

290. See FIRREA, *supra* note 1, § 901(a) (codified at 12 U.S.C. § 1786(r)), defining the term for purposes of the FCUA as follows:

- (1) any committee member, director, officer, or employee of, or agent for, an insured credit union;
- (2) any consultant, joint venture partner, and any other person as determined by the [NCUA] Board (by regulation or on a case-by-case basis) who participates in the conduct of the affairs of an insured credit union; and
- (3) any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in —
 - (A) any violation of any law or regulation;
 - (B) any breach of fiduciary duty; or
 - (C) any unsafe or unsound practice,
 which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the insured credit union.

291. See, e.g., FIRREA, *supra* note 1, § 901(a) (codified at 12 U.S.C. § 1786(r)) (defining "institution-affiliated party" for purposes of the Federal Credit Union Act), FIRREA, *supra* note 1, § 901(b)(1) (codified at 12 U.S.C. § 1818(b)(1), (c), (e)(4)-(f), (g)(1), (3), (h)(2), (i), (m)) (utilizing new terminology in FDIA cease and desist, temporary cease and desist, suspension and removal, summary suspension and removal powers), FIRREA, *supra* note 1, § 901(b)(2) (codified at 12 U.S.C. § 1786(e)(1), (f), (i)(1), (3), (j)(2), (o)) (utilizing new terminology in corresponding FCUA powers).

292. See FIRREA, *supra* note 1, § 901(d) (codified at 12 U.S.C. § 1818) (substituting "depository institution(s)" for "bank(s)" throughout the section). Cf. *supra* note 1 (meaning of "depository institution").

293. See FIRREA, *supra* note 1, § 204(c) (codified at 12 U.S.C. § 1813(c)(1)). See also *supra* note 2.

294. See FIRREA, *supra* note 1, § 204(f)(4) (codified at 12 U.S.C. § 1813(q)(4)).

295. FIRREA, *supra* note 1, § 902(a)(1)(C) (codified at 12 U.S.C. § 1818(b)(8)).

296. Compare 12 U.S.C. § 1818(b)-(k) (1988) with *id.* §§ 1464(d)(2)-(15), 1730(b)-(q).

297. Such persons might be acquiring as little as 10% of the outstanding voting shares of the depository institution. See 1 M. MALLOY, *supra* note 1, at 276-77 (discussion of CBCA-implementing regulations establishing rebuttable presumption of "control" for certain acquisitions of 10% of voting shares). See also 12 U.S.C. § 1817(j)(1), (8)(B) (1988) (Change in Bank Control Act notice requirements triggered by acquisition of "control," broadly defined).

ers, and accountants under specified circumstances. While such participants may have been subject to suits on behalf of a depository institution by a receiver once the institution had failed,²⁹⁸ their inclusion within the concept of "institution-affiliated party" now gives the regulators preventive authority before matters have reached the dire straits of the actual failure of the institution.

In fact, much else has changed in the enforcement powers, so that not only the scope (as to potential enforcement targets) but also the impact of these powers has expanded in significant ways. FIRREA's expansion of the cease and desist and temporary cease and desist authority²⁹⁹ contains, *inter alia*, an apparent repudiation of the Seventh Circuit's *en banc* decision in *Larimore v. Conover*,³⁰⁰ and now expressly authorizes—contrary to *Larimore*—orders requiring restitution or reimbursement, indemnification, or guarantee against loss in certain specified circumstances.³⁰¹ This authority to order affirmative corrective action includes the power to order restrictions on the growth of a depository institution, disposal of a loan or other asset involved in a violation or unsafe or unsound practice, and employment of qualified officers or employees (subject to regulatory approval).³⁰²

The grounds for issuance of a temporary cease and desist order have been amended. Pre-FIRREA, a regulatory agency was required to make a determination that a violation or practice "is likely to cause insolvency or substantial dissipation of assets or earnings of the bank, or is likely to seriously weaken the condition of the bank or otherwise seriously prejudice the interests of its depositors prior to the completion of the [cease and desist] proceedings"³⁰³ before a temporary cease and desist order could be issued. FIRREA provides for issuance of a temporary order upon any of the following alternative findings:

(i) that the violation or practice is likely to cause insolvency of the depository institution involved, a ground that is unchanged by FIRREA, except for its broader application to any "depository institution;"³⁰⁴

(ii) that the violation or practice is likely to cause *significant*, rather than "substantial," dissipation of assets or earnings of the depository institution, a change in standard that was intended to "lower the agencies' burden of proof . . . and . . . cover anything more than a minimal or nominal dissipation of assets;"³⁰⁵ or

298. See, e.g., *Federal Deposit Ins. Corp. v. Main Hurdman*, 655 F. Supp. 259 (E.D. Cal. 1987) (malpractice action by FDIC as assignee of failed bank against bank's former accountant).

299. See FIRREA, *supra* note 1, § 902 (codified at 12 U.S.C. §§ 1818(b)–(c), 1786(e)–(f)).

300. 789 F.2d 1244 (7th Cir. 1986), *reversing*, 775 F.2d 890 (7th Cir. 1985). For a critique of *Larimore*, see Malloy, *supra* note 34, at 780–81.

301. See FIRREA, *supra* note 1, § 902(a)(1)(C) (codified at 12 U.S.C. § 1818(b)(6)(A)(i)–(ii)) (amending FDIA), FIRREA, *supra* note 1, § 902(b)(1) (codified at 12 U.S.C. § 1786(e)(3)(A)(i)–(ii)) (amending FCUA).

302. FIRREA, *supra* note 1, § 902(a)(1)(C) (codified at 12 U.S.C. § 1818(b)(6)(B)–(F)) (amending FDIA), 902(b)(1) (codified at 12 U.S.C. § 1786(e)(3)(B)–(F)) (amending FCUA). See also FIRREA, *supra* note 1, § 902(a)(1)(C) (codified at 12 U.S.C. § 1818(b)(7)) (adding FDIA authority to order limitations on activities or functions of institution or institution-affiliated party), FIRREA, *supra* note 1, § 902(b)(1) (codified at 12 U.S.C. § 1786(e)(4)) (adding corresponding FCUA authority).

303. 12 U.S.C. § 1818(c)(1) (1988). See *id.* § 1786(f)(1) (corresponding FCUA provision).

304. Cf. *supra* note 292.

305. H.R. Conf. Rep. No. 222, *supra* note 10, at 439.

(iii) that the violation or practice is likely to weaken (rather than "seriously weaken") the condition of the bank or otherwise prejudice (rather than "seriously prejudice") the interests of the institution's depositors.³⁰⁶

A temporary cease and desist order may include an order restricting the growth of the depository institution involved.³⁰⁷ Temporary orders are also authorized to deal with situations in which pertinent books and records are so inaccurate that the enforcing agency is unable to determine, in the normal supervisory process, what the financial condition of the involved depository institution might be, or cannot determine the details or purpose of any transaction that might have a material effect on the financial condition of the institution.³⁰⁸ Such orders are effective upon service, and they remain in effect (absent court action to the contrary)³⁰⁹ until the completion of the cease and desist proceedings, or until the agency determines, by examination or otherwise, that the books and records are accurate and reflect the institution's financial condition.³¹⁰

General removal and prohibition authority has been substantially amended and merged by FIRREA,³¹¹ with temporary suspension or prohibition during the pendency of a removal or prohibition action treated separately.³¹² Removal or prohibition of participation of an institution-affiliated party requires a determination, *inter alia*, of actual or probable "financial loss or other damage," "prejudice[]" to depositors' interests, or "financial gain or other benefit" to such party,³¹³ rather than "substantial financial loss" or "serious[] prejudice[]"³¹⁴ as was the case pre-FIRREA. The intention of these changes was to "allow[] the regulatory agencies to proceed with a removal or prohibition action . . . without requiring the agencies to quantify the harm or prejudice."³¹⁵

FIRREA also resolves controversy over two specific types of situations involving the application of removal and prohibition orders. First, express authority is now granted for industry-wide imposition of removal and prohibition orders,³¹⁶ an appli-

306. FIRREA, *supra* note 1, § 902(a)(2)(A)(i)-(ii) (codified at 12 U.S.C. § 1818(c)(1)) (amending FDIA); FIRREA, *supra* note 1, § 902(b)(2)(B)(i)-(ii) (codified at 12 U.S.C. § 1786(f)(1)) (corresponding FCUA provision).

307. FIRREA, *supra* note 1, § 902(a)(2)(A)(iii) (codified at 12 U.S.C. § 1818(c)(1)) (amending FDIA); FIRREA, *supra* note 1, § 902(b)(2)(B)(iii) (codified at 12 U.S.C. § 1786(f)(1)) (corresponding FCUA provision).

308. FIRREA, *supra* note 1, § 902(a)(2)(B) (codified at 12 U.S.C. § 1818(c)(3)(A)) (amending FDIA); FIRREA, *supra* note 1, § 902(b)(2)(C) (codified at 12 U.S.C. § 1786(f)(3)(A)) (corresponding FCUA provision).

309. See FIRREA, *supra* note 1, § 902(a)(2)(B) (codified at 12 U.S.C. § 1818(c)(3)(B)(ii)) (amending FDIA), *citing* 12 U.S.C. § 1818(c)(2); FIRREA, *supra* note 1, § 902(b)(2)(C) (codified at 12 U.S.C. § 1786(f)(3)(B)(ii)) (corresponding FCUA provision), *citing* 12 U.S.C. § 1786(f)(2).

310. FIRREA, *supra* note 1, § 902(a)(2)(B) (codified at 12 U.S.C. § 1818(c)(3)(B)(ii)(I)-(II)) (amending FDIA); FIRREA, *supra* note 1, § 902(b)(2)(C) (codified at 12 U.S.C. § 1786(f)(3)(B)(ii)(I)-(II)) (corresponding FCUA provision).

311. See FIRREA, *supra* note 1, § 903(a)(1) (codified at 12 U.S.C. § 1818(e)(1)) (amending FDIA); FIRREA, *supra* note 1, § 903(b)(1) (codified at 12 U.S.C. § 1786(g)(1)) (corresponding FCUA provisions).

312. See FIRREA, *supra* note 1, § 903(a)(2) (codified at 12 U.S.C. § 1818(e)(3)) (authorizing temporary suspension or prohibition under FDIA); FIRREA, *supra* note 1, § 903(b)(2) (codified at 12 U.S.C. § 1786(g)(3)) (corresponding FCUA provisions).

313. FIRREA, *supra* note 1, § 903(a)(1) (codified at 12 U.S.C. § 1818(e)(1)(B)(i)-(iii)) (amending FDIA); FIRREA, *supra* note 1, § 903(b)(1) (codified at 12 U.S.C. § 1786(g)(1)(B)(i)-(iii)) (corresponding FCUA provisions).

314. 12 U.S.C. §§ 1786(g)(1), 1818(e)(1) (1982).

315. H.R. Conf. Rep. No. 222, *supra* note 10, at 439.

316. FIRREA, *supra* note 1, § 903(a)(3), (b)(3) (codified at 12 U.S.C. §§ 1818(e)(6)(A), 1786(g)(5)(A), respec-

cation of the removal/prohibition authority that excited some criticism pre-FIRREA.³¹⁷ Absent the written consent of the issuing agency and "the appropriate Federal financial institutions regulatory agency,"³¹⁸ any person³¹⁹ subject to removal, suspension, or prohibition from participation is prohibited from holding office in, or participating in the affairs of, any insured depository institution, a BHC or BHC affiliate,³²⁰ a foreign bank or holding company subject to section 8(a) of the International Banking Act of 1978³²¹ because of entry into the United States,³²² a savings association, an insured credit union, or a farm credit bank.³²³ In addition, the industry-wide ban extends to holding office or participating in the conduct of the affairs of any of the federal depository institution regulators themselves, the FHFB, any FHLB, and the RTC.³²⁴ Violations of industry-wide bans are treated as violations of an order.³²⁵

Second, under certain specified circumstances, express authority is also granted to institute regulatory enforcement proceedings against institution-affiliated parties

tively) (referencing industry-wide removal/prohibition provisions), FIRREA, *supra* note 1, § 904(a) (codified at 12 U.S.C. § 1818(e)(7)) (industry-wide removal/prohibition provision of FDIA), FIRREA, *supra* note 1, § 904(b) (codified at 12 U.S.C. § 1786(g)(7)) (corresponding FCUA provision).

317. See *Anonymous v. Federal Deposit Ins. Corp.*, 619 F. Supp. 866 (D.D.C. 1985) (enjoining issuance of industry-wide removal of bank director). For a discussion of the issues raised by *Anonymous*, see Alper, *FDIC Suspension and Removal Powers: An Industrywide Bar*, 104 BANKING L.J. 539 (1987).

318. See FIRREA, *supra* note 1, § 904(a) (codified at 12 U.S.C. § 1818(e)(7)(B)) (FDIA industry-wide removal/prohibition provisions; written consent). See also FIRREA, *supra* note 1, § 904(b) (codified at 12 U.S.C. § 1786(g)(7)(B)) (corresponding FCUA provision). For these purposes, the term "appropriate Federal financial institutions regulatory agency" is defined to mean:

- (i) the appropriate Federal banking agency, in the case of an insured depository institution;
- (ii) the Farm Credit Administration, in the case of an institution chartered under the Farm Credit Act of 1971;
- (iii) the [NCUA] Board, in the case of an insured credit union . . . ;
- (iv) the Secretary of the Treasury, in the case of the [FHFB] and any [FHLB]; and
- (v) the Oversight Board, in the case of the [RTC].

FIRREA, *supra* note 1, § 904(a) (codified at 12 U.S.C. § 1818(e)(7)(D)(i)-(v)) (FDIA provision). For the corresponding FCUA provision, see FIRREA, *supra* note 1, § 904(b) (codified at 12 U.S.C. § 1786(g)(7)(D)(i)-(v)). The FIRREA requires consultation between the pertinent agencies before written consent may be provided. FIRREA, *supra* note 1, § 904(a) (codified at 12 U.S.C. § 1818(e)(7)(E)) (FDIA provision), FIRREA, *supra* note 1, § 904(b) (codified at 12 U.S.C. § 1786(g)(7)(E)) (corresponding FCUA provision).

319. The industry-wide ban provisions are generally applicable to "persons" who are individuals, unless the appropriate agency specifically finds that the provisions should apply to a corporation, firm or other business enterprise. FIRREA, *supra* note 1, § 904(a) (codified at 12 U.S.C. § 1818(e)(7)(F)) (FDIA provision), FIRREA, *supra* note 1, § 904(b) (codified at 12 U.S.C. § 1786(g)(7)(F)) (corresponding FCUA provision).

320. The enforcement provisions now apply generally to BHCs and BHC affiliates. See FIRREA, *supra* note 1, § 902(a)(1)(A) (codified at 12 U.S.C. § 1818(b)(3)) (applying FDIA enforcement provisions to BHCs and affiliates).

321. 12 U.S.C. § 3106(a) (1988), which subjects the following types of entities to specified provisions of federal law:

- Except as otherwise provided in this section (1) any foreign bank that maintains a branch or agency in a State,
- (2) any foreign bank or foreign company controlling a foreign bank that controls a commercial lending company organized under State law, and (3) any company of which any foreign bank or company referred to in (1) and (2) is a subsidiary. . . .

322. The enforcement provisions now apply generally to such banks and companies. See FIRREA, *supra* note 1, § 902(a)(1)(B) (codified at 12 U.S.C. § 1818(b)(4)) (applying FDIA enforcement provisions to certain foreign banks and holding companies).

323. FIRREA, *supra* note 1, § 904(a) (codified at 12 U.S.C. § 1818(e)(7)(A)(i)-(iv)). For the corresponding provisions of the FCUA, see FIRREA, *supra* note 1, § 904(b) (codified at 12 U.S.C. § 1786(g)(7)(A)(i)-(iv)).

324. FIRREA, *supra* note 1, § 904(a) (codified at 12 U.S.C. § 1818(e)(7)(A)(v)-(vii)). For the corresponding provisions of the FCUA, see FIRREA, *supra* note 1, § 904(b) (codified at 12 U.S.C. § 1786(g)(7)(A)(v)-(vii)).

325. FIRREA, *supra* note 1, § 904(a) (codified at 12 U.S.C. § 1818(e)(7)(C)) (FDIA provision); FIRREA, *supra* note 1, § 904(b) (codified at 12 U.S.C. § 1786(g)(7)(C)) (corresponding FCUA provision).

who have resigned, been terminated, or otherwise have separated from the institution.³²⁶ This provision repudiates the contrary result of the D.C. Circuit's decision in *Stoddard v. Board of Governors*.³²⁷

FIRREA has also expanded the summary suspension and removal powers to include state criminal proceedings as a ground for initiating proceedings.³²⁸ Federal criminal penalties for knowing participation in any institution's affairs in violation of a removal or prohibition order have been clarified,³²⁹ and criminal penalties for knowing unauthorized participation by a convicted person have been increased.³³⁰

In addition, civil money penalties have been expanded and increased.³³¹ Three tiers of civil money penalties against depository institutions and institution-affiliated parties have been established. The first tier imposes penalties not exceeding 5,000 dollars per day during the continuation of a violation of any law or regulation, of any order or temporary order, of any written condition imposed in connection with the grant of an application or other request, or of any written agreement between any agency and a depository institution.³³² The second tier imposes penalties not exceeding 25,000 dollars per day during the continuation of any such violation, when it involves recklessly engaging in an unsafe or unsound practice, or breach of a fiduciary duty, and where the violation, practice, or breach is part of a "pattern of misconduct" that causes more than minimal loss to the depository institution, or results in pecuniary gain or other benefit to such party.³³³ The third tier imposes maximum civil money penalties, which may amount to as much as one million dollars per day³³⁴ during the continuance of such a violation, practice or breach, in situations

326. See FIRREA, *supra* note 1, § 905(a) (codified at 12 U.S.C. § 1818(i)(3)) (FDIA separation-from-service provision); FIRREA, *supra* note 1, § 905(b) (codified at 12 U.S.C. § 1786(k)(3)) (corresponding FCUA provision). To similar effect are the FIRREA's amendments of (i) the National Bank Act enforcement provision (see FIRREA, *supra* note 1, § 905(e) (codified at 12 U.S.C. § 93(c))); (ii) the civil money penalty provisions of the Federal Reserve Act (see FIRREA, *supra* note 1, § 905(f),(g) (codified at 12 U.S.C. §§ 504(m), 505(m))); (iii) penalty provisions of the HOLA, *supra* note 157, § 10(i) (see FIRREA, *supra* note 1, § 905(j)); (iv) enforcement provisions under the Change in Bank Control Act (see FIRREA, *supra* note 1, § 905(c) (codified at 12 U.S.C. § 1817(j)(15))); (v) general penalty provisions under the FDIA (see FIRREA, *supra* note 1, § 905(d) (codified at 12 U.S.C. § 1828(j)(6))); (vi) the penalty provisions of the BHCA (see FIRREA, *supra* note 1, § 905(i) (codified at 12 U.S.C. § 1847(c))); and (vii) the penalty provisions of the anti-tying prohibitions of the BHCA Amendments of 1970 (see FIRREA, *supra* note 1, § 905(h) (codified at 12 U.S.C. § 1972(2)(I))).

327. 868 F.2d 1308 (D.C. Cir. 1989). For a discussion of *Stoddard*, see M. MALLOY, *supra* note 1, in 1989 Cum. Supp. No.2 at 84.

328. See FIRREA, *supra* note 1, § 906(a)(1) (codified at 12 U.S.C. § 1818(g)(1)) (FDIA provision), FIRREA, *supra* note 1, § 906(b)(1) (codified at 12 U.S.C. § 1786(i)(1)) (corresponding FCUA provision).

329. See FIRREA, *supra* note 1, § 908 (codified at 12 U.S.C. §§ 1786 (l), 1818(j)).

330. See FIRREA, *supra* note 1, § 910 (codified at 12 U.S.C. §§ 1785(d), 1829).

331. See FIRREA, *supra* note 1, § 907 (codified at 12 U.S.C. §§ 93(b), 481, 504, 505(1), 1467(i) [HOLA, *supra* note 157, § 10(i)], 12 U.S.C. §§ 1786(k)(2), 1817(j)(16), 1818(i)(2), 1828(j)(4)-(5), 1847, 1972(2)(F)). Cf. *supra* note 326 (separation-of-service provisions).

332. See, e.g., FIRREA, *supra* note 1, § 907(a) (codified at 12 U.S.C. § 1818(i)(2)(A)) (amending FDIA civil money penalties provision).

333. See, e.g., FIRREA, *supra* note 1, § 907(a) (codified at 12 U.S.C. § 1818(i)(2)(B)).

334. On the determination of the maximum penalties, see, e.g., FIRREA, *supra* note 1, § 907(a) (codified at 12 U.S.C. § 1818 (i)(2)(D)). Mitigating factors with respect to the determination of any specific penalty under any of the three tiers are specified in FIRREA. See, e.g., FIRREA, *supra* note 1, § 907(a) (codified at 12 U.S.C. § 1818(i)(2)(G)):

- (i) the size of financial resources and good faith of the insured depository institution or other person charged;
- (ii) the gravity of the violation;
- (iii) the history of previous violations; and
- (iv) such other matters as justice may require.

where the depository institution or institution-affiliated party knowingly or recklessly causes substantial loss to the institution or substantial pecuniary gain or other benefit through the violation, practice, or breach.³³⁵ Penalties are assessed and collected by written notice, and the assessment is final and unappealable unless a hearing is requested within the period of time specified by FIRREA.³³⁶

Among other things, FIRREA also increases penalties, on a similar three-tiered basis, for failure to submit timely and accurate reports as required by federal law.³³⁷ In addition, FIRREA has created significant authority for the federal regulators to disapprove the proposed addition of any individual to the board of directors or the employment of any individual as a senior executive officer of depository institutions in certain specified circumstances.³³⁸

These, then, are among the principal changes introduced by FIRREA to enhance the administrative enforcement powers of the federal regulators of depository institutions. These changes embody a formidable array of expanded regulatory weapons against impermissible conduct on the part of depository institutions and institution-affiliated parties, both management participants and peripheral participants who are, for the first time, brought directly within the regulatory scheme of administrative enforcement. However, with increased power has come, to a modest degree, increased responsibility. Consistent with recommendations made by the Administrative Conference of the United States (ACUS),³³⁹ FIRREA now generally mandates the publication and availability to the public of final orders issued with respect to administrative enforcement proceedings initiated by such agencies, and of subsequent modifications and terminations of such orders.³⁴⁰

In addition, consistent with ACUS recommendations,³⁴¹ FIRREA has required, before the end of the twenty-four-month period commencing with its enactment, that the federal regulators jointly establish their own pool of ALJs for formal adjudications.³⁴² The regulators are also required, within the same period, to develop a set of uniform rules and procedures for administrative hearings, including provisions for "summary judgment" rulings where there are no disputes as to material facts of the case.³⁴³

335. See, e.g., FIRREA, *supra* note 1, § 907(a) (codified at 12 U.S.C. § 1818(i)(2)(C)).

336. See, e.g., FIRREA, *supra* note 1, § 907(a) (codified at 12 U.S.C. § 1818(i)(2)(E)). The institution or party charged must submit a request for a hearing within 20 days of the issuance of the notice of assessment. See, e.g., FIRREA, *supra* note 1, § 907(a) (codified at 12 U.S.C. § 1818(i)(2)(H)). Cf. FIRREA, *supra* note 1, § 951 (authorizing Attorney General to initiate civil action for civil penalties for specified bank-related criminal offenses).

337. See FIRREA, *supra* note 1, § 911(b)-(f) (codified at 12 U.S.C. §§ 161, 164, 324, 1782(a)(3), 1817(a)(1), 1847(d)).

338. See FIRREA, *supra* note 1, § 914.

339. See 1 C.F.R. § 305.87-12 (1989). See also Malloy, *supra* note 34, at 791-92.

340. FIRREA, *supra* note 1, § 913 (codified at 12 U.S.C. §§ 1818(u), 1786(s)). On the need for such improvements in agency practice, see *infra* notes 348-54 and accompanying text.

341. See 1 C.F.R. § 305.87-12 (1989). See Malloy, *supra* note 34, at 795-97.

342. FIRREA, *supra* note 1, § 916(1). On the need for such improvements in agency practice, see *infra* notes 357-63 and accompanying text.

343. FIRREA, *supra* note 1, § 916(2). See Malloy, *supra* note 34, at 793-94. On the need for such improvements in agency practice, see *infra* notes 364-82 and accompanying text.

V. CONCLUSION

The recent regulatory efforts at revising the rules of practice and procedure have done much to change the topography of the terrain of formal administrative enforcement proceedings, and FIRREA has significantly altered the composition of the subsurface resources available to the regulators in such proceedings. The question remains, however, whether depository institutions and institution-affiliated parties that may be the subjects of such proceedings are likely to find themselves trapped in a procedural sinkhole as they trek across this landscape. The truth is that there is much for such institutions and parties to fear in FIRREA, but there is also some glimmer of procedural reform on the horizon.

In November 1987 this author submitted a report to the ACUS identifying several problems with the administrative practices concerning formal enforcement proceedings and formulating some recommendations for reform.³⁴⁴ These recommendations were substantially adopted by the ACUS in December 1987,³⁴⁵ but with the addition of a recommendation that the agencies consider adopting a formal or informal "precomplaint procedure," such as the Securities and Exchange Commission's internal rule for "Wells submissions,"³⁴⁶ before action was taken to initiate a formal enforcement proceeding.³⁴⁷ Taken as a whole, the revisions promulgated or proposed by the FDIC, FHLBB, and the OCC have done little to advance the recommendations intended to achieve a modicum of administrative consistency and balance in the application of the practice and procedure rules to targets of formal enforcement proceedings. Ironically, FIRREA, which does so much to enhance the power and effectiveness of the regulators, also appears to have made significant strides towards achieving something of an appropriate balance between the regulators and potential targets.

The extreme degree of confidentiality in which formal enforcement proceedings have been wrapped³⁴⁸ has generally extended even to the final orders issued in such

344. See Malloy, *Adjudication Practices and Procedures of the Federal Bank Regulatory Agencies*, 1987 ACUS 1215 (consultant report) [hereinafter ACUS Report].

345. See 52 Fed. Reg. 49,141, 49,151 (1987) (codified at 1 C.F.R. § 305.87-12).

346. See Sec. Ex. Act. Rel. No. 9796, [1972-1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,010 (Sept. 27, 1972).

347. 52 Fed. Reg. 49,152 (1987):

The agencies should explore, in their circumstances, the utility of establishing a formal or informal procedure to allow targets of investigations an opportunity to file a submission with the appropriate agency official before official action is taken to initiate an enforcement proceeding.

This writer opposed this recommendation as of doubtful utility in light of the many informal opportunities afforded for exchanges of views between potential targets and the agencies before a formal stance emerges. See ACUS Report, *supra* note 344, at 1271-72 n.197. See also Malloy, *supra* note 34, at 755-56 n.196. Both the FDIC and the FHLBB took the same position in their respective revisions. See 53 Fed. Reg. 51,659 (1988) (FDIC discussion of "Wells submission" recommendation, citing with approval ACUS Report criticism of recommendation); 54 Fed. Reg. 26,352 (1989) (FHLBB discussion, citing with approval ACUS Report criticism of recommendation).

348. See, e.g., 12 C.F.R. § 308.18(a)-(b) (1989) (FDIC revised provision):

(a) . . . Hearings under this subpart B shall be private unless the [FDIC] Board or its designee determines, after considering the views of the Respondent, that a public hearing is necessary to protect the public interest.

(b) . . . No Respo[n]dent shall disclose or otherwise use any information which is not publicly available and which was obtained through discovery or at the hearing for any purpose other than litigation of the proceeding, including appeals, if any.

See also *id.* § 509.25(b) (FHLBB revised provision, recommended and final decision and order confidential); 54 Fed.

proceedings.³⁴⁹ The secrecy surrounding the contents of final orders adversely affects "the practical ability of counsel to research and to advise bank and bank officer clients that may be potential respondents in possible enforcement actions."³⁵⁰ It also hampered the preparation and work of ALJs assigned from other, nonbanking agencies to preside over the regulator's formal enforcement proceedings.³⁵¹

Responding to this problem, the ACUS adopted a recommendation that the regulators make available, through regular publication or similarly accessible means of dissemination, redacted versions of decisions and accompanying orders with respect to formal enforcement proceedings.³⁵² As of the enactment of FIRREA, only the FDIC had acted to implement the ACUS recommendation, instituting a commercial publication program for redacted recommended and final decisions in formal enforcement proceedings.³⁵³ The FHLBB revision, published while FIRREA was in the final stages of congressional consideration, explicitly continues confidentiality of recommended and final decisions.³⁵⁴

FIRREA has now given legal force to the ACUS recommendation, but with one important limitation. The appropriate agency may make a determination in writing "that the publication of any final order . . . would seriously threaten the safety and soundness of an insured depository institution, [and] delay the publication of such order for a reasonable time."³⁵⁵ Given the near obsession with the secrecy of enforcement proceedings that seems to persist at some of the agencies,³⁵⁶ there may be

Reg. 22,774 (1989) (to be codified at 12 C.F.R. § 19.44(a)) (OCC proposed revision; confidentiality of all papers and documents in private proceedings).

349. See ACUS Report, *supra* note 344, at 1332-33; "[T]here is currently [November 1987] no publication or other similar dissemination of the decisions in administrative adjudications." (Footnote omitted.)

350. *Id.* at 1333 (footnote omitted).

351. See, e.g., Letter from Marvin H. Morse, Chief Administrative Law Judge, to Marshall J. Breger, Chairman, Administrative Conference of the United States, June 30, 1986, at 3 (confidentiality of enforcement proceedings leaves few systematic opportunities to study the precedents; ALJs lacking specialized expertise).

352. 1 C.F.R. § 305.87-12 (1989).

353. See Malloy, *supra* note 1, in 1989 Cum. Supp. No. 2 (discussing FDIC publication program). *But cf. infra* note 356 (discussing post-FIRREA public availability of OCC and NCUA final orders).

354. See 12 C.F.R. § 509.25(b) (1989):

[T]he entire record in any proceeding under this part, including, but not limited to, the . . . recommended decision of the [ALJ], [and] the decision and order of the [FHLBB] . . . shall not be made public, and shall be for the confidential use only of the [FHLBB] and its staff, the [ALJ], the parties, and appropriate supervisory authorities.

355. FIRREA, *supra* note 1, § 913(a) (codified at 12 U.S.C. § 1818(u)(2)). For the corresponding exception under the FCUA, see FIRREA, *supra* note 1, § 913(b) (codified at 12 U.S.C. § 1786(s)(2)).

356. See, e.g., ACUS Report, *supra* note 344, at 1222 n.9 (indirect resistance of OCC to access to enforcement information on the part of ACUS consultant). The OCC has since announced that it will make publicly available documents in enforcement at proceedings before ALJs. See OCC, NR 89-98, Oct. 27, 1989, *citing* FIRREA and the ACUS recommendation in this regard. In October 1989, the NCUA promulgated in final form revisions of its regulations governing administrative actions, adjudicative hearings, and rules of practice and procedure. 54 Fed. Reg. 43,280 (1989) (codified at 12 C.F.R. pt. 747). The revised regulations include a provision, in accordance with FIRREA, relating to public availability of final orders, as follows:

(a) The [NCUA] Board will make available to the public all: (1) Final enforcement orders issued pursuant to this [P]art; and (2) modifications to or terminations of such orders.

(b) Notwithstanding the foregoing, the [NCUA] Board may delay publication of an order if it makes a determination in writing that such publication would seriously threaten the safety and soundness of an insured credit union.

(c) All final orders published pursuant to this Part shall be made available in the library of the Office of the General Counsel, NCUA, 1776 G Street, NW, Washington, DC 20456.

54 Fed. Reg. at 43,283 (1989) (codified at 12 C.F.R. § 747.122).

a great temptation to invoke this FIRREA exception uncritically. If this were to occur, the whole purpose of the FIRREA publication mandate would be frustrated.

The problem raised by the lack of publicly available final decisions has been exacerbated by the fact that, despite statutory requirements to the contrary,³⁵⁷ the depository institutions' regulators have not employed their own ALJs, but instead have relied on interagency loans of detailed ALJs.³⁵⁸ Except where an ALJ happens to have been repeatedly detailed, this practice raises a serious potential for inconsistency in procedure, in decisions, and in the overall efficiency of proceedings which may be presided over by a relatively inexperienced or uncertain ALJ.³⁵⁹

It may be that the requirement of maintaining its own ALJs would be burdensome for any individual depository institution regulator, given the relatively small number of formal enforcement proceedings that advance to the hearing stage.³⁶⁰ Nevertheless, sporadic details of nonbanking agency ALJs hardly would seem to be an adequate alternative.

In response to this problem, the ACUS adopted a recommendation that the regulators consider developing a pooling arrangement for the employment of administrative law judges, to be available to each pool participant as necessary.³⁶¹ The regulators essentially ignored the recommendation.³⁶² FIRREA has provided clear legal authority for an ALJ pooling arrangement, and, indeed, has made such an arrangement mandatory.³⁶³

One other pervasive problem in the practice of the agencies is evident from a review of Illustration 2, and even a cursory reading of the text of the regulatory provisions cited in the illustration. There is significant variation, in terms of relative degrees of detail, and occasionally in terms of basic approach, among the rules of practice and procedure respectively adopted by the regulators. As the ACUS Report noted:

Given that each of the regulators is implementing essentially the same statutory authorities, it is not readily understandable why the procedural regulations should vary to the extent that they do from agency to agency. Admittedly, there are extensive similarities among these

357. See 5 U.S.C. § 3105 (1989):

Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with [id. §§] 556 and 557. . . .

(Emphasis added.)

358. See ACUS Report, *supra* note 344, at 1337.

359. See *id.*

360. See *id.* at 1337-38 n.504.

361. 1 C.F.R. § 305.87-12 (1989).

362. In its revised rules, the FDIC provided specific procedures for the appointment of ALJs that made it clear that it would continue the practice of detailing ALJs. 12 C.F.R. § 308.06(a),(b)(1) (1989). The FHLBB revised rules are virtually identical in this regard. See *id.* § 509.3(a),(b)(1). However, the FHLBB did advert to the proposal favorably in its discussion of the revised rules. See 54 Fed. Reg. 26,353 (1989). To the extent that it even alludes to the issue, the OCC proposed revision is entirely ambiguous. See *id.* at 22,768 (to be codified at 12 C.F.R. § 19.1(k)) (defining "presiding officer" as "an administrative law judge . . . designated by the Comptroller . . . to conduct a hearing"). The Fed rules are similarly ambiguous. See 12 C.F.R. § 263.6(a)(1) (1989) ("an administrative law judge . . . lawfully appointed by the Board"). In contrast, the NCUA regulations are forthright in describing the process of appointment of an ALJ. See *id.* § 747.106(a) ("an Administrative Law Judge selected by the Office of Administrative Law Judges, Office of Personnel Management and designated by the Board").

363. FIRREA, *supra* note 1, § 916(1).

regulations, but the significant differences in degree of detail . . . do[] not seem justifiable. Further, all of these regulations are weak on such details as rules of discovery and evidence.³⁶⁴

The ACUS accepted this position, and adopted a recommendation that

The [five] agencies should develop, so far as feasible, a uniform set of rules of practice and procedure for formal adjudications, including more explicit provisions covering prehearing practice and discovery rules and the receipt of evidence.³⁶⁵

The ACUS took account of the fact that absolute uniformity was probably neither achievable nor desirable. Nevertheless, the ACUS argued, "the five agencies jointly should be able to develop substantially similar rules of procedure and practice for formal enforcement proceedings."³⁶⁶ From observable actions on the part of agencies since the adoption of the ACUS recommendation, however, it would appear that the agencies have been unable to do so.

As of the enactment of FIRREA, neither the Fed nor the NCUA had publicly initiated any substantial review of their respective rules of practice and procedure. The FDIC and the FHLBB had by then completed revisions of their rules, and the OCC had begun such a process, but there still appeared to be nothing like a movement towards uniformity—"substantial" or otherwise—even among these three agencies.

By far the most responsive effort has been that of the FDIC, and its revised rules might well serve as a target for the substantial convergence of the respective rules of the other regulators. The FDIC revision manifests a substantial response to ACUS concerns over the need for detail in rules governing prehearing practice. This response is evident in the relatively detailed treatment of such matters as the appointment and powers of ALJs,³⁶⁷ maintenance of the record,³⁶⁸ filing and service of papers,³⁶⁹ time limits,³⁷⁰ witness fees and expenses,³⁷¹ settlement offers,³⁷² amendment of pleadings and intervention,³⁷³ consolidation and severance of actions,³⁷⁴ and motion practice.³⁷⁵

While the FDIC revision does represent a marked improvement over its previous rules as to discovery, both in terms of the level of detail and overall informativeness of the provisions,³⁷⁶ the general limitation of discovery to documentary discovery is virtually no advance over previous provisions.³⁷⁷ As to rules of evidence, the FDIC revision has also provided relatively more detailed guidance.³⁷⁸ In particular, it

364. ACUS Report, *supra* note 344, at 1336.

365. 1 C.F.R. § 305.87-12 (1989) (footnotes omitted).

366. 52 Fed. Reg. 49,151 (1987).

367. See 12 C.F.R. §§ 308.06-308.07 (1987).

368. See *id.* § 308.11.

369. See *id.* §§ 308.12-308.13.

370. See *id.* §§ 308.14-308.15.

371. See *id.* § 308.16.

372. See *id.* § 308.17.

373. See *id.* §§ 308.22-308.23.

374. See *id.* § 308.24.

375. See *id.* § 308.30.

376. See *id.* §§ 308.25-308.27.

377. Compare *id.* § 308.29(a) with 12 C.F.R. § 308.08(a)(2) (1988).

378. See 12 C.F.R. § 308.38 (1989).

adopts suggestions made by this author and by the ACUS³⁷⁹ for inclusion of specific reference in the rules to Rule 403 of the Federal Rules of Evidence, allowing exclusion of evidence when the probative value is outweighed by such factors as its potential for undue consumption of time.³⁸⁰

The FHLBB revisions represented a similar, if even less complete, movement in the direction suggested by the ACUS recommendation. Its treatment of rules of evidence remains limited, however,³⁸¹ and little if any advance has been made with respect to discovery practice.³⁸² Furthermore, while it may be premature to judge the OCC position on the basis of its notice of proposed rulemaking, it must be said that the peculiar stylistic fragmentation of the generally applicable procedural provisions into a multitude of subparts seems only to mask the fact that little advance over the current OCC rules would result from the adoption of the OCC proposal. In any event, the OCC proposed revision would, if anything, result in even less uniformity in the rules of practice and procedure among the five regulators.

FIRREA has now imposed a statutory mandate on the regulators to "develop a set of uniform rules and procedures for administrative hearings, including provisions for summary judgment rulings where there are no disputes as to material facts of the case."³⁸³ As matters now stand, the regulators are further removed from even the substantial uniformity advocated by the ACUS than they were when the ACUS recommendation was made in December 1987. A uniform set of rules must now be adopted within twenty-four months of August 9, 1989, the date of FIRREA enactment.³⁸⁴ Since it took the FDIC over nine months to move from its proposed revision to its final adoption, and the FHLBB took over eight months, the regulators would be well advised to turn their full attention immediately to FIRREA's mandate in this regard.³⁸⁵ Much time and effort would be saved if the regulators took the FDIC's revision as a commendable, if not wholly complete, starting point for their movement towards uniform rules.

379. See, e.g., 1 C.F.R. § 305.86-2 (1989).

380. 12 C.F.R. § 308.38(a) (1989).

381. See *id.* § 509.24. See also 54 Fed. Reg. 26,351 (1989) (FHLBB discussion; rejecting suggestions for expanded provisions with respect to rules of evidence).

382. See 12 C.F.R. § 509.21-509.23 (1989). See also 54 Fed. Reg. 26,351 (1989) (FHLBB discussion; endorsing limited use of prehearing discovery).

383. FIRREA, *supra* note 1, § 916(2).

384. See *id.*

385. The NCUA has already promulgated regulatory amendments in response to specific changes in enforcement-related statutory provisions made by FIRREA. See 54 Fed. Reg. 43,280 (1989) (codified at 12 C.F.R. pt. 747). However, these amendments do not further the FIRREA objective of uniform formal enforcement procedures. Indeed, the immediate effect of these amendments is to increase the lack of uniformity among the corresponding regulations of the five agencies. Cf. Illustration 2, note b, *supra*.

